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1 UNITED STATES BANKRUPTCY COURT

2 SOUTHERN DISTRICT OF NEW YORK

3 Case No. 05-44481

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5 In the Matter of:

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7 DELPHI CORPORATION,

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9 Debtor.

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11 January 13, 2006

12 10:00 AM

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14 United States Custom House

15 One Bowling Green

16 New York, New York 10004

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18 B E F O R E:

19 HON. ROBERT D. DRAIN, U.S. BANKRUPTCY JUDGE

20

21 Order/Pursuant to ADJ.HRG.RE: Doc #1401; LEAD

22 PLAINTIFFS| OBJECTION TO DEBTORS| MOTION TO

23 EMPLOY DELOITTE & TOUCHE, LLP.

24

25 ADJ.HRG.RE: Doc #1619; LEAD PLAINTIFFS| MOTION

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1 TO COMPEL DISCOVERY RELATED TO THE DEBTORS|  
2 MOTION TO IMPLEMENT A KEY EMPLOYEE  
3 COMPENSATION PROGRAM.

4  
5 ADJ.HRG.RE: Doc #1691; DEBTORS| OBJECTION TO  
6 THE LEAD PLAINTIFFS| MOTION TO COMPEL  
7 DISCOVERY.

8  
9 ADJ.HRG.RE: Doc #1719; DEBTORS| RESPONSE TO  
10 THE LEAD PLAINTIFFS| OBJECTION TO THE DEBTORS|  
11 MOTION TO EMPLOY DELOITTE & TOUCHE, LLP.

12  
13 ADJ.HRG.RE: Doc #1799; MOTION TO QUASH  
14 SUBPOENAS SERVED BY LEAD PLAINTIFFS ON JOHN  
15 SHEEHAN, LAURA MARION, DAN RENICK, AND JOHN  
16 ROTKO.

17  
18 Transcribed By:

19 Lisa Bar-Leib  
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P R O C E E D I N G S

THE COURT: All right, Delphi Corporation.

MR. BUTLER: Your Honor, good morning, Jack Butler from Skadden, Arps, Slate, Meagher and Flom, LLP, here with my colleagues and partners, Kayalyn Marafioti and David Springer, and our colleagues, Andrew Tenzer and William Roll from Shearman Sterling, all representing the debtors in connection with this adjourned matters hearing. Your Honor, the matters that are before the Court today are two matters that appeared on the third omnibus hearing agenda and were first scheduled to be considered at the January 5th, 2006 omnibus hearing. Those are matters 34 and 37 on that agenda. The number 34 on the agenda is the Deloitte and Touche matter. Today is the adjourned hearing on the retention application for Deloitte and Touche which has been limited by the debtors to be enough for (inaudible) October 8, 2005,

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and to cover the 2005 fiscal year audit. And that is found at docket number 1222. The other matter before the Court is the lead plaintiff's KECP discovery motion and related matters. That is agenda item number 37 from the January 5th agenda, at docket number 1619, and there's been a related motion to quash file the docket number 1799. With Your Honor's permission, we'd proceed in those agenda items order and take the Deloitte and Touche matter first.

THE COURT: Okay, that's fine.

MR. TENZER: Good morning, Your Honor, Andrew Tenzer of Sherman and Sterling, LLP. I'm here with my colleagues, Bill Roll and Ronette Kelly on behalf of the debtors. On the debtor's application to retain Deloitte and Touche to conduct audit work on behalf of the debtors and their estates. Your Honor, before I discuss the motion on its merits, just a couple of administrative and housekeeping matters. First, Your Honor, I just wanted to note that last week when we were before you on discovery

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matters related to this motion, Your Honor ruled that the lead plaintiffs who have objected to the motion were entitled to take a deposition of one member of Delphi's audit committee on the subject of why Delphi changed auditors from Deloitte and Touche in 2005 to Ernst & Young in 2006, and I just wanted to let Your Honor know that that deposition did take place on Wednesday of this week.

Second, Your Honor, there have been two objections filed to the motion. One was times the application. One was a limited objection filed by the creditors' committee on two sub-points -- they don't object to the application in and of itself, but there were two sub-points that they objected to. We've been in discussions with the committee and with Deloitte. Those objections have been resolved. We need to finalize the language that's going to go into the order that we would present to Your Honor if Your Honor grants the application. And we can do that either at the end of the hearing, or later in the day. If there would be some changes to

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2 the order, I would want to walk Your Honor  
3 through.

4 THE COURT: Okay. What is the  
5 gist of the resolution?

6 MR. TENZER: There are two  
7 objections raised. One was that the committee  
8 wanted to make sure that any finding of  
9 disinterestedness here didn't effect any  
10 avoidance actions that the committee may later  
11 have against Deloitte and the committee  
12 proposed language in its limited objection  
13 that we've all agreed on. And the second  
14 issue is designed to make sure that to the  
15 extent there are things that Deloitte did pre-  
16 petition, it doesn't assert administrative  
17 claims for those acts. Conversely, if  
18 Deloitte does things post-petition, it has the  
19 right to seek administrative claims for those  
20 --

21 THE COURT: Through its  
22 indemnification.

23 MR. TENZER: Well, no --  
24 really -

-- or, otherwise through the work that  
25 it's done. If it worked on a matter and some



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of that work was pre-petition and some of that work was post-petition, any claim that they have it's very clear, and this is the law, that if they did something pre-petition, they can assert a pre-petition claim, and if they did something post-petition, they can assert a post-petition claim. That's really all the language does.

THE COURT: Right. Okay. But I thought that the committee's concern was that there would be some implication or construction that because of the indemnification provisions of their engagement letters being ratified, if you will, as modified by the order, that there would be a 100 cent dollar indemnification obligation on the debtor's part for work done pre-petition.

MR. TENZER: That is a fair characterization of the committee's concern, and that concern is addressed by the language that we will submit to Your Honor.

THE COURT: Okay. So, it wouldn't be a hundred cent dollar.

MR. TENZER: That's right --

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THE COURT: It would be a  
claim.

MR. TENZER: I'll talk a  
little bit about the indemnity. There is no  
indemnity provision in the audit engagement  
letter. There is one in the government  
services engagement letter --

THE COURT: Right.

MR. TENZER: -- but Your Honor  
is absolutely right as to what the concern was  
and what was addressed.

THE COURT: Okay. All right.

MR. TENZER: And then, the  
other objection, obviously, is the one of the  
lead plaintiffs, which I'll be spending most  
of my time on today. That objection, as we  
noted for Your Honor, was filed in furtherance  
of a different agenda and for different  
reasons than the committee, and again, we'll  
argue today that it should be overruled.

Last, Your Honor, just as a  
matter of proceeding today, the debtors, when  
they filed their motion submitted an affidavit  
of Brock Plumb of Deloitte in support of that

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application. Mr. Plumb has submitted an additional supplementary affidavit and when we filed our opposition -- I'm sorry, our reply to the lead plaintiff's opposition to the application, we attached to our opposition the declaration of Bob Dellinger, who is the CFO of the company and the debtors are prepared to rely on those affidavits and declaration as their evidentiary showing. Unless Your Honor has a different view, we don't plan on putting on direct evidence. Both of those gentlemen are present in the courtroom today, and if anybody wanted to cross-examine them when we wanted to take redirect, that can be arranged. But unless Your Honor wants us to, we don't plan on putting on any other direct evidence today.

THE COURT: Okay. Let me make sure -- the Dellinger affidavit is -- what's the date of that? I want to make sure it's the one I've seen. Is that --

MR. TENZER: I believe that was filed on the -- I don't know the date of the declaration, Your Honor. I believe the

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2 pleading was filed on the fourth.

3 THE COURT: Okay. So, it's  
4 the one dated December 29th?

5 MR. TENZER: Yes.

6 THE COURT: All right. So,  
7 I've read both of those. All right. Now, of  
8 course, then you have them here and they can  
9 be cross-examined on their affidavits,  
10 correct?

11 MR. TENZER: They're both  
12 here. Yes, that's not a problem.

13 THE COURT: Okay. All right.

14 MR. TENZER: Okay.

15 THE COURT: That's fine.

16 MR. TENZER: So, let me then  
17 turn, Your Honor, to the merits of the  
18 application itself.

19 THE COURT: Well, should we  
20 have them -- does anyone want to cross-examine  
21 them on their affidavits first?

22 MR. SABELLA: Yes, Your Honor.  
23 Jim Sabella from Grant and Eisenhoffer with  
24 the lead plaintiffs. I propose to call them.

25 THE COURT: Okay. All right.

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2 Why don't we do that then?

3 MR. TENZER: What I was  
4 hoping, Your Honor, that we would each be  
5 allowed to make legal argument first, and then  
6 have the witnesses testify to the extent Mr.  
7 Sabella wants them to?

8 THE COURT: Well, if the legal  
9 argument is just as to the standards I should  
10 apply, that's okay. But, if you're going to  
11 be getting into the facts, I think I want to  
12 hear cross-examination before I --

13 MR. TENZER: It's somewhat of  
14 an articulation of the standards that you  
15 should apply, Your Honor. It's also, even  
16 more so, a rebuttal of the statements that the  
17 lead plaintiffs have made and --

18 THE COURT: All right. I'd  
19 rather hear cross-examination first on that  
20 then.

21 MR. TENZER: Okay.

22 THE COURT: So, Mr. Plumb?  
23 You can take a seat in the witness box,  
24 please.

25 (Witness sworn in.)

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2 THE COURT: And this just for  
3 the record, could you state your name?

4 THE WITNESS: Brock E. Plumb.

5 THE COURT: And your  
6 occupation?

7 THE WITNESS: I'm a CPA.

8 THE COURT: With?

9 THE WITNESS: Oh, I'm a  
10 partner at Deloitte and Touche.

11 THE COURT: Okay.

12 THE WITNESS: Have a seat,  
13 right?

14 THE COURT: Yes.

15 EXAMINATION BY MR. SABELLA:

16 Q. Good morning, Mr. Plumb.

17 A. Good morning.

18 Q. Jim Sabella from Grant &  
19 Eisenhoffer. I represent the lead plaintiffs  
20 in the securities litigation. Has Deloitte  
21 released the debtors from any claims or cross-  
22 claims that Deloitte may have against the  
23 debtors relating to audits of Delphi's  
24 financial statements?

25 A. Could you repeat the question,

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2 please?

3 Q. Has Deloitte released the  
4 debtors from any claims or cross-claims that  
5 Deloitte may have against the debtors relating  
6 to the audits of Delphi's financial  
7 statements?

8 MR. SCHWED: Your Honor, may I  
9 object? My name is Greg Schwed of Loemann &  
10 Lowe representing Deloitte. Mr. Plumb is not  
11 qualified -- these are legal conclusions that  
12 Mr. Plumb is not qualified or -- an  
13 inappropriate person to readdress this issue.

14 THE COURT: Well, he did sign  
15 the affidavit of disinterestedness. So, to  
16 your knowledge, and I'm not asking you to make  
17 a legal -- you know, whether there's been some  
18 sort of wave, or anything like that that  
19 lawyers might argue as a release, but to your  
20 knowledge, has Deloitte executed any release  
21 of the debtors?

22 THE WITNESS: Not to my  
23 knowledge.

24 BY MR. SABELLA:

25 Q. And have the debtors released

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2 Deloitte, to your knowledge, from any claims  
3 or cross-claims that the debtors may have  
4 against Deloitte relating to the audits of  
5 Delphi's financial statements?

6 A. Not to my knowledge.

7 Q. And you've had first-hand  
8 experience with claims being asserted by an  
9 audit client against its auditors, don't you?

10 A. In what way?

11 Q. Well, you were once personally  
12 sued for professional malpractice by an audit  
13 client, weren't you?

14 A. A -- I do -- ref -- refresh my  
15 memory.

16 Q. Well, weren't you sued by  
17 Enzymes of America and PortaJohn Corp. for  
18 professional malpractice in the State Court in  
19 Michigan some years ago?

20 A. Yes, I was.

21 Q. Now, I want to go through who  
22 the team is going to be for the auditor of the  
23 2005 financial statements. As I understand  
24 it, Steve van Arzdale is going to be the  
25 advisory partner or client relationship



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2 partner, is that right?

3 A. That's correct.

4 Q. And you're the engagement  
5 partner?

6 A. I am the lead client service  
7 partner.

8 Q. And Robert Steiner, is he the  
9 concurring partner?

10 A. That's correct.

11 Q. And Jeff Aughton, A-U-G-H-T-O-  
12 N, is he a partner on the engagement?

13 A. He's an audit partner.

14 Q. And Mark Crowley? Is he an  
15 audit partner on the engagement?

16 A. That's correct.

17 Q. Okay. Are there any managers  
18 on the engagement?

19 A. Yes, there are.

20 Q. And what are their names?

21 A. Dennis Moyer, Scott Szalony,  
22 S-Z-A-L-O-N-Y, Katherine Fleming, and then  
23 there are -- those are the -- the three core  
24 team managers based out of Detroit and then  
25 there's, I believe, 50 to 100 additional

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2 managers around the country and around the  
3 world.

4 Q. And are there any field  
5 seniors on the audit?

6 A. Yes.

7 Q. And can you identify them?

8 A. Kyle Urich, have a memory --  
9 memory lapse just at the moment -- there's  
10 Christina Algazar and Angela -- sorry, I can't  
11 remember -- I had a little lapse in that  
12 memory on that one.

13 Q. And then there are also junior  
14 staff accountants?

15 A. Yes. 20 to 30.

16 Q. Okay.

17 A. Those are the ones based in  
18 Detroit and again, on every one of those  
19 positions, there's numerous other people with  
20 that same title around the country and around  
21 the world working on the Delphi audit.

22 Q. Okay. Now when did you join  
23 the engagement team for the audit of the 2005  
24 financial statements?

25 A. Approximately middle of April,

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2 2005.

3 Q. And who was your predecessor?

4 A. Duane Higgins.

5 Q. And Mr. Higgins had been an  
6 engagement partner for two years?

7 A. I believe that's correct, yes.

8 Q. And when did Mr. Steiner join  
9 the engagement team for the 2005 financial  
10 statements?

11 A. At the same time that I did.  
12 Middle of April.

13 Q. How about Mr. Aughton?

14 A. Mr. Aughton? Sometime in  
15 2003.

16 Q. How about Mr. Crowley?

17 A. Sometime in 2003.

18 Q. How about Mr. Moyer?

19 A. Mr. Moyer's been on the Delphi  
20 engagement for a longer period of times  
21 because he's been in various positions as he  
22 progressed through the firm. He started as a  
23 senior accountant or staff accountant, then it  
24 progressed to senior. So, his tenure has been  
25 longer. He also, though, had a two-year

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2 hiatus where he served in our Paris office  
3 where one of his clients was the subsidiaries  
4 of Delphi, but he was not predominantly  
5 working on Delphi.

6 Q. So, for example, was he on the  
7 team for the 2001 or 2002 audits?

8 A. I believe he was, yes, in a  
9 subordinate role.

10 Q. Yes. And how about Scott  
11 Szalony?

12 A. Scott Szalony was on the  
13 Delphi audit for a short period of time in, I  
14 believe, 2002 and then he was transferred  
15 again to Paris to replace Mr. Moyer, and where  
16 he spent around two years in Paris doing the  
17 same rotation that Denny Moyer was doing.

18 Q. And then he was back for 2004?

19 A. And he came back some time in  
20 2004.

21 Q. And how about Ms. Fleming?

22 A. She was a staff senior for one  
23 year in -- during the 2003 audit, I believe,  
24 and then promoted to manager.

25 Q. And she's been on the audits

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continuously since 2003 in her various  
capacities?

A. Yes.

Q. Now how about the field  
senior, Kyle Urich? How long has he been on  
Delphi audits?

A. I'm less familiar with the  
history since I just came on in April with the  
seniors. I believe Kyle has been on maybe one  
extra year, or he could be the same thing. He  
was a staff person for a year and then a  
senior.

Q. And how about Christina  
Aldazar?

A. I'd say the same for -- the --  
my knowledge of those three are about the  
same.

Q. And would it be fair to say  
that of the 20 or 30 staff accountants in  
Detroit, some of them have worked on previous  
Delphi audit engagement before the 2005 audit?

A. Yes.

Q. Now, am I correct that,  
generally speaking, the audit manager writes

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2 the audit program?

3 A. No, that's not correct.

4 Q. That's not correct?

5 A. No.

6 Q. Who writes the audit program?

7 A. The audit programs are -- a --  
8 a product first of the firm, which has an  
9 outline of a program, and then they're agreed  
10 to by the audit team, including the lead  
11 client partner, the two other partners that  
12 you referred to, Jeff Aughton and Mark  
13 Crowley, and then the managers. It's a joint  
14 effort.

15 Q. Is it fair to say that the  
16 manager provides primary supervision and  
17 direction to the professional staff in the  
18 execution of the audit plan and in the  
19 performance of the audit engagement?

20 A. They provide the supervision.  
21 In the case of the Delphi audit, at least  
22 while I'm there, I can tell you that I was  
23 hands on and I would say I also provided that  
24 primary supervision.

25 Q. You're familiar with the

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2 Deloitte audit approach manual, aren't you?

3 A. Yes, right.

4 Q. And the audit approach manual  
5 sets forth various responsibilities for  
6 various members of the audit team, does it  
7 not?

8 A. Yes.

9 Q. All right. And the audit  
10 approach manual says that the manager performs  
11 a primary review of the working papers,  
12 financial statements and reports, is that  
13 correct?

14 A. That's correct.

15 Q. And the audit approach manual  
16 says that the manager participates in the  
17 planning and the overall management of the  
18 audit engagement, right?

19 A. That's correct.

20 Q. OK. And according to the  
21 audit approach manual, the field senior  
22 supervises the work of the field staff, right?

23 A. What is the -- field senior is  
24 the term you used?

25 Q. Yes.

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2 A. I don't remember a verbatim,  
3 but that's what they do.

4 Q. Well, does that sound like  
5 what you think the field senior does?

6 A. That is what they do.

7 MR. ROLL : Your Honor, I'm  
8 sorry to interrupt. It's William Roll of  
9 Shearman and Sterling on behalf of the  
10 debtors. I think at this point I have to  
11 object in fairness to this witness. We're now  
12 getting a new narrative as we just heard that  
13 he's not remembering, and I think it would  
14 only be appropriate to have Mr. Sabella, if he  
15 has the document, to show it to the witness  
16 and let the witness see the entire thing.

17 MR. SABELLA: I'm glad to do  
18 that --

19 THE COURT: Do you have -- do  
20 you have more that you're going to go through?  
21 We could start with this document --

22 MR. SABELLA: I only have  
23 actually one more excerpt I was going to read,  
24 but I --

25 THE COURT: All right. Why



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2 don't you ask --

3 MR. SABELLA: -- but I'd like  
4 to mark it as Exhibit 1. I think it is useful  
5 if Your Honor doesn't mind.

6 THE COURT: All right.

7 MR. SABELLA: Okay.

8 THE COURT: Just give a copy  
9 to the witness then.

10 MR. SABELLA: For the record,  
11 what we've marked as the first Exhibit are  
12 three pages from the Deloitte audit approach  
13 manual. The first page, just to sort of  
14 identify it, are pages 30 and 31, which  
15 describe responsibilities of the audit manager  
16 and what is called the accountant in charge or  
17 field senior.

18 MR. ROLL: What I want to do  
19 is premature. Mr. Sabella hasn't offered it  
20 yet, but it seems to me that before we even  
21 get to that point, I have the witness testify  
22 in furtherance of this document. We ought to  
23 have the entire document. We just heard Mr.  
24 Sabella identify the exhibits consistently --

25 THE COURT: Well, are you

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2 doing this just to refresh the witness'

3 recollection is that --

4 MR. SABELLA: Yeah, the actual  
5 document is like 800 pages long.

6 THE COURT: All right.

7 MR. SABELLA: I didn't bring  
8 it with me.

9 THE COURT: Well, I guess the  
10 issue -- you haven't offered to introduce it  
11 yet. If this was in response to the prior  
12 objection, --

13 MR. SABELLA: Precisely.

14 THE COURT: -- which is to  
15 show the document to the witness, so, I'll  
16 note the objection, but you may never need to  
17 make it because there may never be a request  
18 to actually introduce it into evidence  
19 depending on the witness' testimony, so --

20 BY MR. SABELLA:

21 Q. Mr. Plumb, I'd like you to  
22 just to take a look at what is listed on page  
23 31 as the responsibilities of the field  
24 senior.

25 A. I'd just like to point out

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2 that is -- my view of this -- this is not a  
3 current document. And then, so, therefore, I  
4 don't have a recollection of it at a point in  
5 time. Our audit manuals are updated  
6 constantly, and I could see that there's  
7 references in here to 1995 and 1996, so this  
8 is probably very out of date.

9 Q. Yeah, and I cannot make a  
10 representation as to what year this relates  
11 to. But, let me ask you then, is it the case  
12 that the field senior supervises the work of  
13 the field staff?

14 A. Are you referring to the  
15 document again, or are you referring --

16 Q. I'm just asking you questions.

17 A. Would you please repeat it?

18 Q. Could I ask the reporter to  
19 read it?

20 THE COURT: Well, you can't,  
21 really, cause we're doing it on a taping  
22 system.

23 MR. SABELLA: Oh, I'm  
24 certainly sorry.

25 THE COURT: The question was

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2 to your knowledge, do the field seniors  
3 supervise the field staff?

4 THE WITNESS: Yes.

5 BY MR. SABELLA:

6 Q. And is it also the case that  
7 the field senior performs a detailed review of  
8 each working paper prepared by the field  
9 staff, if not reviewed by another member of  
10 the engagement team?

11 MR. ROLL: Your Honor, I'm  
12 going to object. Mr. Sabella is clearly  
13 reading from the document when we've already  
14 heard that it can't even be used to refresh  
15 this witness' recollection because of its age.  
16 I object to this.

17 MR. SABELLA: I think I just  
18 asked a question.

19 THE COURT: Well, I'm not  
20 asking you to verify a document. Generally,  
21 is that your understanding of what the field  
22 seniors do?

23 THE WITNESS: Yes, that's  
24 generally what occurs. Our work is prepared,  
25 then reviewed -- and it goes through several

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2 reviews. And in the case of Delphi, in the  
3 case of the 2004 audit, we had extra levels of  
4 review, so all of these analyses that we do  
5 went up through at least one partner and  
6 sometimes multiple partners.

7 BY MR. SABELLA:

8 Q. And now with respect to the  
9 staff accountants, they're the ones who  
10 actually in the first instance, go through the  
11 company's books and records, correct?

12 A. They -- they perform the  
13 initial auditing procedures in some areas.

14 Q. And in fact, when the audit  
15 work is intense and at its peak, they're at  
16 the client's premises, virtually every day,  
17 aren't they?

18 A. Yes, they are.

19 Q. And, during heavy months of  
20 audit work, the staff accountants would  
21 actually have an office at the client's  
22 premises where they would work out of, right?

23 A. Not always. Sometimes they  
24 would work out of a conference room or a  
25 cubicle. Not an office, per se.

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2 Q. But they'd be located at the  
3 client's premises?

4 A. Yes, that's common.

5 Q. Right. Now, prior to April of  
6 2005 when you and Mr. Steiner joined the audit  
7 team, had any audit work been done for the  
8 2005 audit?

9 A. Not to my knowledge.

10 Q. Do you recall when the  
11 engagement letter for the 2005 audit was  
12 issued and sent to the company?

13 A. In late August, 2005.

14 Q. Had any audit work for the  
15 2005 audit of Delphi's financial statements  
16 been commenced before the engagement letter  
17 was sent?

18 A. We -- excuse me -- we had  
19 performed quarterly review procedures which  
20 are used as part of our audit or a basis for  
21 our audit, but as to interim audit procedures  
22 of any kind, not of any of -- any great  
23 substance. Just quarterly reviews. Keep in  
24 mind, we were busy through June 30th with  
25 their revised 10K, auditing their 10K.

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1 DELPHI CORPORATION

2 Q. And in your affidavit, there  
3 is some material relating to the fees, I  
4 believe, that Deloitte has been paid in 2005.  
5 Do you have a recollection of approximately  
6 how much Deloitte has been paid in 2005?

7 A. For the 2005 --

8 Q. With respect --

9 A. -- audit?

10 Q. Well, I want to get there.  
11 But let me just start with the aggregate  
12 number with respect to 2005 services.

13 A. I don't have a clear -- I re -  
14 - I have a fairly clear recollection of the 25  
15 -- 2005 audit, but beyond that, it's a pretty  
16 complicated formula, and I can't recall those  
17 --

18 Q. All right. What is your  
19 recollection for the 2005 audit?

20 A. We had been paid, including  
21 the quarterly review work that I referred to,  
22 I believe, roughly 3.8 million, something in  
23 that range -- 3.7 or 3.8 million dollars.

24 Q. Okay.

25 A. And that's for -- that's for

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1 DELPHI CORPORATION

2 the United States only.

3 Q. And the work that you did on  
4 the restatements of the prior year's financial  
5 statements, is the reimbursement for that work  
6 included in the 3.8, or is that a separate --

7 A. That's all separate.

8 Q. Okay. Now, let's talk about  
9 the quarterly reviews for a moment. Those are  
10 quarterly --

11 THE COURT: Well -- can I  
12 interrupt? The question was the work you did  
13 on that -- when you understood the question is  
14 the work you did, did you read that as you  
15 personally, or Deloitte & Touche did on the  
16 restatement?

17 THE WITNESS: I meant the  
18 firm.

19 THE COURT: Okay.

20 THE WITNESS: Yeah. That  
21 included me, of course, but --

22 THE COURT: This the whole  
23 firm?

24 THE WITNESS: The whole firm.

25 THE COURT: All right.



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1 DELPHI CORPORATION

2 BY MR. SABELLA:

3 Q. Now, Delphi's quarterly  
4 financial statements are prepared by Delphi's  
5 accounting department, is that correct?

6 A. That's correct.

7 Q. Deloitte doesn't prepare its  
8 clients' financial statements, correct?

9 A. They do not.

10 Q. Right. And Deloitte did not  
11 issue any audit opinions on the quarterly  
12 financial statements for Delphi in 2005, did  
13 it?

14 A. Quarterly -- quarterly reports  
15 don't usually have an audit. They are just  
16 reviews.

17 Q. Right. So, the quarterly  
18 financial statements were not audited and no  
19 audit report was issued on them?

20 A. That's correct.

21 Q. And Deloitte didn't issue  
22 formal review reports on the quarterly  
23 financials, either, did it?

24 A. It did not, not in a written  
25 form.

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1 DELPHI CORPORATION

2 Q. Right. So, it's fair to say  
3 that for the year-end audit, you can't simply  
4 take reports on the quarterly financial  
5 statements, audit the fourth quarter and say  
6 you're done, can you?

7 A. That's correct.

8 Q. Now, sir, you understand that  
9 the plaintiffs have objected to the retention  
10 of Deloitte, right?

11 A. Yes.

12 Q. And when did you become aware  
13 of that? And I'll represent to you the  
14 objection was filed on or about December 2nd  
15 of this year --

16 A. December 2nd.

17 Q. Okay. And you understand if  
18 the objection is sustained, there is some  
19 possibility that Deloitte would not be paid  
20 further for work done on the 2005 audit?

21 A. Post-petition the claim.  
22 Services, yes, I understand that.

23 Q. And you expressed a concern to  
24 Mr. Dellinger, the CFO, on or about December  
25 12th as to whether or not Deloitte would get

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2 paid for its work, right?

3 A. I -- I'd -- in a certain  
4 respect, I said that we knew we wouldn't get  
5 paid if we were not appointed. So, I said,  
6 yes, we -- we have incurred over two million  
7 dollars in fees and we would wait now -- await  
8 the Court's appointment because we had been  
9 told that we would have been approved earlier  
10 than that.

11 Q. And, do you have any knowledge  
12 of Deloitte making a request for an agreement  
13 on an interim compensation proposal, so that  
14 Deloitte would get paid for the work that it's  
15 doing post-petition?

16 A. I don't have any direct  
17 knowledge. I thought there was something  
18 introduced last week about that since we  
19 didn't get approved on the Fifth.

20 Q. Okay. And because of these  
21 concerns about Deloitte -- whether or not  
22 Deloitte will be paid for its services -- is  
23 it fair to say that over the last month or so,  
24 Deloitte has to some extent limited the work  
25 that it's been doing on the 2005 audit?

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1 DELPHI CORPORATION

2 A. Yes, we have. In the United  
3 States. Overseas, they -- is -- the overseas  
4 offices are all performing their statutory  
5 audits as contractually obligated to do.

6 Q. And, did anyone on the audit  
7 committee ever raise with you the idea that  
8 perhaps Deloitte would be replaced on the 2005  
9 audit?

10 A. Well, sometime in the fall, I  
11 can't remember the exact date, they informed  
12 me that they were -- the Board had requested  
13 the audit committee and management to seek  
14 proposals from all the big four firms for the  
15 2006 audit, including Deloitte.

16 Q. Right, 2006. But my question  
17 was was there any suggestion that they'd also  
18 replace you for 2005?

19 A. Not to my knowledge.

20 Q. And did you have any  
21 conversations with the audit committee about  
22 possible changes in Deloitte audit procedures  
23 to avoid in the future any of the problems  
24 that led to the restatements of prior year  
25 financial statements?

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1 DELPHI CORPORATION

2 A. I don't recall specifically  
3 that topic, no.

4 Q. And did anyone from the audit  
5 committee ever raise with you any concern that  
6 if Deloitte continued with 2005 audit,  
7 Deloitte might have an incentive not to  
8 disclose any further errors it might find in  
9 prior years financial statements --

10 MR. ROLL: Your Honor --

11 BY MR. SABELLA:

12 Q. -- because of concern over its  
13 possible liability?

14 MR. ROLL: I'm sorry to  
15 interrupt. I have to object to that. I think  
16 that there's absolutely no foundation to that.  
17 There's an assumption built into that question  
18 that I think there's no reason to include at  
19 this point.

20 THE COURT: What's the  
21 question again?

22 MR. SABELLA: I just want to  
23 know if it ever came up between him and the  
24 audit committee the conflict concern that  
25 we've set forth in our objection that Deloitte

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might have an incentive not to dig in to prior  
year problems because of their situation.

MR. ROLL: Respectfully, Your  
Honor, I think that's a slightly different  
question. The one before has --

THE COURT: All right. You  
can ask that question. That's fine.

THE WITNESS: Would you repeat  
it?

BY MR. SABELLA:

Q. My question is whether it was  
ever a subject of discussion between you and  
the audit committee the fact that the lead  
plaintiffs had as one of their grounds for  
objection raised the point that Deloitte might  
have a conflict and incentive not to disclose  
any errors it might find in prior year's  
financial statements?

A. Let me make sure I understand.  
Is the question do we have a discussion about  
the lead plaintiffs' motion?

Q. Let's start with that.

A. Yes.

Q. And with whom did you have

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2 that discussion?

3 A. The full audit committee.

4 Q. Okay. And did they tell you  
5 that one of the things that the lead  
6 plaintiffs were arguing was that Deloitte had  
7 a conflict of interest, because it might have  
8 an incentive not to disclose any further  
9 errors it might find in the prior years  
10 financial statements?

11 A. No.

12 Q. Apart from the objection filed  
13 by the lead plaintiffs, did anyone from the  
14 audit committee ever raise with you any  
15 concern that Deloitte might have such an  
16 incentive?

17 A. No.

18 MR. SABELLA: That's all I  
19 have for this witness, Your Honor.

20 THE COURT: Okay. Any  
21 redirect?

22 MR. ROLL: Your Honor, I do  
23 have some redirect. I'm prepared to proceed  
24 with it now, although I would say if the Court  
25 could indulge me with a two-minute recess to

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2 check on one fact, I think it would go a  
3 little more efficiently.

4 THE COURT: All right. Well,  
5 you have to check with the witness, though,  
6 so, that's fine.

7 MR. ROLL: I intended to. If  
8 I could just speak with Deloitte's counsel for  
9 now.

10 THE COURT: That's fine. So  
11 we'll come back at 11:00. Mr. Plumb, you  
12 shouldn't discuss your testimony --

13 THE WITNESS: Stay here?

14 THE COURT: Yeah, you can stay  
15 here. That's the best thing for you to do.

16 (Court recesses.)

17 MR. ROLL: Thank you, Your  
18 Honor, at the top, let me just say I  
19 appreciate the Court's indulgence in that  
20 short recess.

21 THE COURT: Okay.

22 MR. ROLL: That was very  
23 helpful.

24 REDIRECT EXAMINATION BY MR. ROLL:

25 Q. Good morning, Mr. Plumb.



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1 DELPHI CORPORATION

2 A. Good morning.

3 Q. You recall on your cross-  
4 examination by Mr. Sabella, he asked you,  
5 among other things, whether Deloitte had  
6 released any claims against Delphi. Do you  
7 recall that?

8 A. I do.

9 Q. Do you know if any claims have  
10 been asserted against Delphi by Deloitte?

11 A. I do not know of any.

12 Q. You were also asked by Mr.  
13 Sabella if Delphi had released any claims  
14 against Deloitte. Do you recall that?

15 A. Yes.

16 Q. Do you know if Delphi has  
17 asserted any claims against Deloitte at this  
18 point?

19 A. Not to my knowledge.

20 Q. You testified in response to  
21 Mr. Sabella's questions that you were the lead  
22 client services partner in connection with the  
23 proposed work from Deloitte and Touche on the  
24 2005 audit. Is that correct?

25 A. That's correct.

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1 DELPHI CORPORATION

2 Q. Do you believe yourself to be  
3 qualified to perform that role in connection  
4 with the audit?

5 A. I do.

6 Q. And can you tell us a little  
7 bit about why you believe that with respect to  
8 your qualifications and so forth?

9 A. Sure. I'll keep it as brief  
10 as necessary, but -- been a partner at De --  
11 an audit partner at Deloitte for -- since  
12 1982, so over 23 years I've worked for  
13 Deloitte. For over 35 years, I've been  
14 engaged in audits of companies of all sizes  
15 including public companies, global public  
16 companies, throughout my career. I am also  
17 the lead technical partner for the Michigan  
18 practices for the Deloitte firm. And I  
19 believe I have this sufficient experience to  
20 supervise and conduct the audit -- 2005 audit.

21 Q. Has anyone at Delphi expressed  
22 any concerns to you about the extent of your  
23 qualifications to serve in the role of lead  
24 client services partner?

25 A. None whatsoever.

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2 Q. You were asked a number of  
3 questions by Mr. Sabella about the team that  
4 Deloitte would propose to use in connection  
5 with the 2005 audit. Do you remember those  
6 questions generally?

7 A. Generally.

8 Q. In your view, Mr. Plumb, is  
9 the team that you would be using in connection  
10 with that different from the Deloitte team  
11 that was involved in connection with the  
12 actual audits with respect to the prior years  
13 that were restated in 2005?

14 A. I do believe it. The team  
15 that I referred to -- the teams that did the  
16 audit based -- based in 2000 and 2001, which  
17 were the years of the most significant  
18 restatement entries, those teams have almost  
19 100 percent turned over at corporate office,  
20 so I feel that our team is totally independent  
21 and has a fresh look. It had a fresh look in  
22 the '04 audit and will continue in the 2005  
23 audit.

24 Q. Okay. Let me ask you if you  
25 could amplify that a little bit. What do you

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2 mean by fresh look? What does that mean?

3 A. Totally -- as I said, I came  
4 onto the job, Bob Steiner came onto the job in  
5 April of 2005. Prior to that, we'd had no  
6 involvement in the audit of Delphi at any time  
7 prior to that. And a fresh look is -- what  
8 our firm sometimes does is customarily can --  
9 can do to bring in an independent partner or  
10 independent team to look at the restatement  
11 and become the lead client services partner  
12 totally, you know, independently.

13 Q. You testified earlier with  
14 respect to Mr. Steiner being part of the team?

15 A. Yes.

16 Q. Do you know anything about Mr.  
17 Steiner's qualifications to serve in the  
18 capacity that he's serving in with respect to  
19 the 2005 audit.

20 A. Yes. Mr. Steiner is a  
21 concurring partner in the 2004 audit and then  
22 in the -- actually, in the 2005 audit. He's  
23 the national audit risk management partner.  
24 He has over 40 years experience. He's the  
25 lead technical partner for Deloitte for the

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1 DELPHI CORPORATION

2 North-Central region, which is roughly 20 some  
3 offices. And highly qualified to do his job.

4 Q. I just want to make sure I  
5 heard. How many years experience did you say?

6 A. Approximately 40.

7 Q. 40?

8 A. Uh-huh.

9 Q. Four zero. Has anyone at  
10 Delphi, including anyone on the audit  
11 committee at Delphi, expressed any concerns to  
12 you about Mr. Steiner's qualifications to  
13 serve in the capacity he will serve in with  
14 respect to the 2005 audit?

15 A. They have not.

16 Q. Are there other members of the  
17 team who are new in the sense that they are  
18 part of this fresh look that you've described?

19 A. Steven Arzdale is the advisory  
20 relationship partner. He was -- he became --  
21 took over his job sometime in the summer, I  
22 think, of 2004, so he's -- he was new to the  
23 '04. He -- he had -- he's an advisory  
24 partner, not actually part of the audit team.  
25 Let's see. I -- I -- that would probably be

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1 DELPHI CORPORATION

2 the key players.

3 Q. Okay. And the individuals  
4 you've named so far, and yourself included, of  
5 course, would you consider those to be the  
6 senior people at Deloitte who will be  
7 responsible for this audit?

8 A. Absolutely.

9 Q. And with respect to any what I  
10 will refer to as significant auditing  
11 decisions, are they the people, yourself  
12 included, who would make those decisions?

13 A. We are.

14 Q. Now, you indicated earlier in  
15 a response to Mr. Sabella's questioning that  
16 some of the people involved doing some of the  
17 work that were around in connection with  
18 earlier years. Do you recall that?

19 A. That's correct.

20 Q. Will any of those people be  
21 making any of the significant decisions with  
22 respect to Deloitte's audit work in connection  
23 with the 2005 financial statements?

24 MR. SABELLA: Objection to the  
25 form of the question.

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2 THE COURT: I'm sorry?

3 MR. SABELLA: Objection to the  
4 form of the question. We don't really know  
5 what he means by significant decisions.

6 THE COURT: That's fair. If  
7 you could define in greater detail what you  
8 mean by significant auditing decisions.

9 MR. ROLL: Well, let me ask  
10 the witness, is there a way, based on your  
11 experience, that you can generally  
12 characterize a significant decision, or  
13 describe what would be a significant decision  
14 requiring senior level input in connection  
15 with an audit like this?

16 THE WITNESS: It's -- it's  
17 hard to explain what significant decisions are  
18 'cause a sig -- but, if you take just a  
19 general understanding that the important  
20 decisions that are made during an audit, which  
21 could be daily or could be by the minute, or  
22 they could, you know, be weekly, those  
23 decisions are all vetted in that group that I  
24 mentioned of very talented partners, and we  
25 come to a collective agreement as to what's

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1 DELPHI CORPORATION

2 the proper decision, whether it's an  
3 accounting decision or an auditing decision.

4 BY MR. ROLL:

5 Q. With that definition that  
6 you've just given us in mind, let me put the  
7 question to you again.

8 A. Uh-huh.

9 Q. Will any of the junior people,  
10 who were involved in some of the earlier  
11 years' audits be making any of the decisions  
12 of the nature you just described in connection  
13 --

14 A. They will not.

15 Q. -- to 2005.

16 A. They will not.

17 Q. Mr. Sabella asked you some  
18 questions about a document he described as the  
19 audit approach manual, do you recall that?

20 A. Yes.

21 Q. Right. He marked three pages  
22 as Exhibit 1. You still have that in front of  
23 you, right?

24 A. I do.

25 Q. I thought I heard Mr. Sabella



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1 DELPHI CORPORATION

2 say in one of his questions that the entire  
3 document was about 800 pages long. Is that  
4 correct, in your view?

5 A. Actually, that's  
6 electronically kept now, so I couldn't tell  
7 you. But it's big.

8 Q. Okay. And is it substantially  
9 bigger than the three pages you have in front  
10 of you?

11 A. Substantially.

12 Q. Is it fair to say that that  
13 big document covers more topics than what you  
14 see in the three pages in front of you, in  
15 Exhibit 1?

16 A. Yes, it does.

17 Q. And do I understand correctly  
18 from what you said earlier that there is a  
19 current version of the document, not the very  
20 old version that's embodied in Exhibit 1 in  
21 front of you?

22 A. That's correct.

23 Q. Is it your understanding, Mr.  
24 Plumb, that the audit of the 2005 financial  
25 statements will be conducted fully in

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2 accordance with the current version of  
3 Deloitte and Touche's audit approach manual?

4 A. That's correct.

5 Q. Mr. Sabella asked you some  
6 questions about the engagement letter with  
7 respect to the audit. Do you remember that?

8 A. Yes.

9 Q. And at one point, he referred  
10 to the letter having been executed on or about  
11 August 29th. Do you recall that?

12 A. That's correct.

13 Q. 2005? Was -- had Deloitte  
14 done any work in connection with the 2005  
15 audit prior to the execution of that letter on  
16 August 29th, 2005?

17 A. We possibly did -- it would be  
18 very little, because we were concentrating on  
19 the quarterly reviews right through June 30th.  
20 And then even actually in the month of August,  
21 the June 30th quarter became due and we worked  
22 on that. So, the amount of work that was  
23 actually under the audit engagement of the  
24 annual financial statements would have been  
25 very little.

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1 DELPHI CORPORATION

2 Q. Mr. Sabella asked you a  
3 question that in substance went along the  
4 following lines: Mr. Plumb, you can't just  
5 take the quarterly reviews from first and  
6 second quarter, and then I suppose the third,  
7 too, and then just do the fourth quarter, and  
8 add those together and come up with the audit  
9 -- I'm paraphrasing obviously, but do you  
10 remember that question?

11 A. I do remember.

12 Q. In your review, Mr. Plumb,  
13 what will be required from this point to  
14 complete the 2005 audit work?

15 A. From the point today --

16 Q. Well, that point --

17 A. -- or from --

18 Q. From the point of Deloitte  
19 having done the first two quarter reviews?

20 A. A very substantial piece to  
21 the audit still had -- has to be done. In  
22 general, our audit of Delphi is very heavily  
23 weighted into the months of October, November,  
24 December, then January and February. So, I  
25 would say, if I were to guess, it would be,

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1 DELPHI CORPORATION

2 like, in -- in August probably ten percent had  
3 been done.

4 Q. Okay. All right. And from  
5 this point today -- let's take that as a  
6 follow-up -- from this point today to the  
7 completion of the work, how much -- what would  
8 you estimate would be required, just in  
9 general terms?

10 A. The -- the -- keep in mind, I  
11 have a better knowledge of the United States  
12 audit. The United States audit is roughly  
13 40,000 man hours --

14 Q. Uh-huh.

15 A. -- and we believe we're around  
16 -- somewhere between 55 and 60 percent  
17 complete as we sit here today.

18 Q. So, would you characterize  
19 that as a significant amount of work remaining  
20 still to be done?

21 A. I would.

22 THE COURT: I'll just go by  
23 his percentages.

24 BY MR. ROLL:

25 Q. Mr. Sabella asked you some

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1 DELPHI CORPORATION

2 questions relating to what Deloitte and Touche  
3 has done in response to, among other things,  
4 in response to the lead plaintiffs' objection.  
5 You recall that question generally?

6 A. I -- vaguely.

7 Q. I think you indicated, and  
8 correct me if I'm wrong, that Deloitte had  
9 slowed down a little bit in connection -- in  
10 its work, in the wake of that objection. Do  
11 you remember that questioning and your  
12 testimony on that?

13 A. Yes.

14 Q. In your view, Mr. Plumb, did  
15 whatever Deloitte was doing at that point, in  
16 response to that objection, does it now, or  
17 did it then, prevent Deloitte from going ahead  
18 and doing what has to be done to get the 2005  
19 audit done successfully and efficiently from  
20 this point?

21 A. I -- I don't believe so. We  
22 suspended our work around December 12th or  
23 somewhere in that range -- in that range, and  
24 during that period, a good period of that at  
25 Delphi is shut down because of the holiday

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break and doesn't start -- didn't start up  
roughly until January 3rd. So, there was not a  
very big portion of the work that was deferred  
into the future period.

Q. Mr. Plumb, based on your  
experience in the world of auditing, and based  
also on what you know about this particular  
company, do you believe that any other  
auditing firm could today step in, pick up  
where Deloitte is right now and finish the  
2005 audit in the same amount of time that you  
would estimate Deloitte could do so?

MR. SABELLA: Objection, Your  
Honor. That calls for speculation. They  
could have asked Ernst & Young -

- they chose  
not to.

THE COURT: Have you ever  
stepped in on behalf of Deloitte and Touche  
for another firm that was in the middle of an  
audit?

THE WITNESS: No.

THE COURT: No? Can you  
answer that question based on your personal  
knowledge?

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1 DELPHI CORPORATION

2 THE WITNESS: I -- I can give  
3 you my opinion about it. Yes.

4 THE COURT: But is it based on  
5 your personal knowledge of --

6 THE WITNESS: Yes. In 35  
7 years experience. It's -- it's my opinion  
8 that the work that we have done is not --  
9 would not be useful to any addition -- any  
10 other firm, because no other firm, and I would  
11 say, including our own, would be willing to  
12 rely on work done by another firm in a company  
13 this complex and adding to the fact that it's  
14 in bankruptcy. So, I believe, that the answer  
15 is there is -- there is no way to use our work  
16 by some other firm.

17 MR. ROLL: I have nothing  
18 further, Your Honor. Thank you.

19 THE COURT: Okay.

20 MR. SABELLA: Your Honor,  
21 Could I ask him one follow-up question?

22 THE COURT: That's fine. I  
23 was going to ask a question, too, so, but go  
24 ahead.

25 BY MR. SABELLA:

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2 Q. Mr. Roll asked you whether or  
3 not Deloitte had in fact asserted any claims  
4 against the debtors, right?

5 A. I think that's what he asked  
6 me, yeah.

7 Q. And you said that has not  
8 occurred?

9 A. That's correct.

10 Q. Have you participated in any  
11 discussions with anyone about the possibility  
12 of asserting claims against the debtors  
13 relating to the audits?

14 A. Not to my knowledge, no.

15 Q. You have not?

16 A. I have not.

17 MR. SABELLA: That's all I  
18 have.

19 THE COURT: Okay. I just want  
20 to make sure I understand a couple of things  
21 that you spoke about, Mr. Plumb. As I  
22 understand it, there was a restatement of  
23 certain audits for Delphi, correct?

24 THE WITNESS: The actual term  
25 is that Delphi's financial statements are



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1 DELPHI CORPORATION

2 restated.

3 THE COURT: Okay.

4 THE WITNESS: Yes.

5 THE COURT: And what years  
6 were those that were restated?

7 THE WITNESS: They filed a 10k  
8 which amended -- which was -- it would have  
9 amended 2003, 2002, because those were the two  
10 most prior years, and then they also changed  
11 the -- some supporting numbers of prior years.

12 THE COURT: Okay. And so,  
13 when you referred to -- I think you said the  
14 most significant restatements were from 2000  
15 and 2001, and I guess, that's why I was  
16 confused. Why -- those would seem to be  
17 earlier years than the years that you just  
18 mentioned.

19 THE WITNESS: When the company  
20 restates and it has an effect on the prior  
21 year, it actually shows -- or on years that  
22 aren't actually presented, it shows up as an  
23 adjustment to their stockholders' equity and  
24 retained earnings --

25 THE COURT: Okay.

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1 DELPHI CORPORATION

2 THE WITNESS: -- and if -- if  
3 you read the 10K, it's very visible that the  
4 very largest numbers happened in the opening  
5 retained earnings, so they applied to --  
6 actually came out of 2000 and 2001.

7 THE COURT: Okay.

8 THE WITNESS: So, they did --  
9 the SEC did not require them to restate those  
10 years individually.

11 THE COURT: All right. Did  
12 the company choose to make those restatements  
13 on its own, or was Deloitte involved in  
14 advising the company to make those  
15 restatements?

16 THE WITNESS: I was not there  
17 at the time, so I can't tell you.

18 THE COURT: Okay. You came in  
19 after the restatements were made?

20 THE WITNESS: I -- no, I came  
21 in as they were being made, but they -- I  
22 think the company made a public disclosure, I  
23 believe in August of '04, and I was not there  
24 then.

25 THE COURT: So, you were not

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2 involved in that aspect of the decision.

3 THE WITNESS: No.

4 THE COURT: Okay. Thank you.

5 THE WITNESS: Uh-huh.

6 THE COURT: All right, you can  
7 step down, sir.

8 MR. SABELLA: Can we call Mr.  
9 Dellinger?

10 THE COURT: Yes. Mr.  
11 Dellinger? Mr. Dellinger? Mr. Dellinger?

12 (Witness sworn in.)

13 THE COURT: You can have a  
14 seat. And then, just for the record, could  
15 you state your name?

16 THE WITNESS: Yes. Robert J.  
17 Dellinger. I'm the executive vice president  
18 and CFO at Delphi Corporation.

19 CROSS-EXAMINATION BY MR. SABELLA:

20 Q. Mr. Dellinger? You began work  
21 at Delphi on or about October of 2005?

22 A. That is correct.

23 Q. And the process to solicit  
24 proposals for firms to do the 2006 audit began  
25 before you started at Delphi, right?

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1 DELPHI CORPORATION

2 A. It is my understanding that  
3 the discussion to pursue new audit firms, or  
4 at least proposals from the four major firms  
5 for 2006 had begun prior to my arrival. We  
6 accelerated the process. I was instructed to  
7 move ahead with that process.

8 Q. Now, in November of 2005,  
9 which is after you became the CFO, the debtors  
10 made a motion in this Court to have Deloitte  
11 do the audits for 2005 quote, and  
12 thereafter, closed quote. Are you familiar  
13 with that?

14 A. I -- I am aware that that  
15 motion was made.

16 Q. Why didn't the company  
17 disclose to the Court in that application that  
18 it was considering having a different firm do  
19 the 2006 audit?

20 A. First of all, we had not made  
21 a decision that it would be a different firm  
22 for 2006. We had simply started the process  
23 to evaluate proposals from the firms. I don't  
24 know that that was relevant to the retention  
25 for -- for '05 and what our long term plans

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1 DELPHI CORPORATION

2 were. I'm not sure I can answer that.

3 Q. Now, in the declaration that  
4 you submitted in this Court, dated January 3,  
5 2006, you said at paragraph 11, and I quote, I  
6 believe that no current members of the audit  
7 team were involved in the audit of those past  
8 transactions which were included within the  
9 scope of the audit committee's investigation  
10 and Delphi's restatement of its financial  
11 statements. Do you remember that?

12 A. Yes, I do.

13 Q. Right. Now, you were sitting  
14 here in the courtroom today when Mr. Plumb  
15 testified about the fact that many of the  
16 staff accountants and the seniors and the  
17 managers on the audit were also on prior year  
18 audits, correct?

19 MR. ROLL: I object, Your  
20 Honor. That mischaracterizes Mr. Plumb's  
21 testimony. There was no testimony about it  
22 being a significant number for the  
23 characterization that Mr. Sabella has  
24 described.

25 THE COURT: Oh, maybe you can

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1 DELPHI CORPORATION

2 restate it just to say certain people.

3 BY MR. SABELLA:

4 Q. Well, you heard Mr. Plumb  
5 testify that there are staff accountants and  
6 managers and field seniors on the 2005 audit  
7 who also worked on prior years' audits,  
8 correct?

9 A. Yes, I did.

10 Q. Having heard that testimony,  
11 do you still stand behind your sworn statement  
12 that no current members of the audit team were  
13 involved in the audit of those past  
14 transactions which were included within the  
15 scope of the audit committee's investigation  
16 and Delphi's restatement of its financial  
17 statements?

18 A. It is my understanding that as  
19 Deloitte took a look at the -- of the  
20 structure of the current team in place today  
21 that there was an effort to make sure that  
22 individuals had not audited significant  
23 transactions that were part of the  
24 restatement. It's a fairly large team. It's  
25 a global team. And that team does rotate on

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2 some standard basis, the exact details of  
3 which I'm not aware. That's a typical process  
4 in audit firms that there is some rotation  
5 schedule. I believe Deloitte went through  
6 that, and I think that's even represented in  
7 the affidavit -- I can't confirm that, I don't  
8 have it in front of me.

9 Q. So, you still think that no  
10 current members of the audit team were  
11 involved in the audits of any of those prior  
12 transactions. Is that your testimony?

13 MR. ROLL: Your Honor, I'm  
14 going to object because the actual statement  
15 in Mr. Dellinger's declaration, the actual  
16 text of paragraph 11 indicates that he's  
17 saying that he believes that Deloitte and  
18 Touche replaced senior members of its audit  
19 team. And that's part of the paragraph that  
20 Mr. Sabella is then selectively quoting from  
21 later on. So, I think this is more than a  
22 little unfair at this point.

23 MR. SABELLA: I don't think I  
24 selected anything. The choice of the word no  
25 current member was Mr. Dellinger's.

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2 THE COURT: Well, from his  
3 affidavit?

4 MR. SABELLA: From his  
5 declaration.

6 THE COURT: Why don't you show  
7 him this declaration?

8 MR. SABELLA: For Your Honor.

9 THE COURT: I have a copy,  
10 thanks.

11 BY MR. SABELLA:

12 Q. You still stand behind the  
13 last sentence in paragraph 11?

14 A. It's my understanding that no  
15 current members of the audit team were  
16 involved in auditing those significant  
17 transactions that were part of the  
18 restatement. That is what I have been told.

19 Q. And that you were told that by  
20 Mr. Plumb?

21 A. That is what I be -- I -- I  
22 understand from his affidavit, yes.

23 Q. So, that's not something he  
24 actually said to you person to person.

25 A. I had not asked him that



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1 DELPHI CORPORATION

2 directly, that is correct.

3 Q. That's just what you gleaned  
4 from his affidavit.

5 A. That -- that's, I believe, the  
6 source of that, yes.

7 Q. Now, Delphi has made a  
8 decision to use Ernst and Young for the 2006  
9 audit, right?

10 A. That is correct. After going  
11 through a fairly extensive proposal process,  
12 the audit committee, not Delphi, selected  
13 Ernst & Young to perform the 2006 audit.  
14 Right.

15 Q. And that switch was made  
16 because the audit committee felt that the  
17 Ernst and Young team was the strongest  
18 relative to the current conditions that Delphi  
19 is facing, correct?

20 A. Well, as we evaluate the audit  
21 firms -- excuse me, as the audit committee  
22 evaluate the audit firms with some input from  
23 the management team, the view that E & Y  
24 presented the best team with the most  
25 experience as we've stated publicly, with Tier

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2 One automotive suppliers and with ongoing  
3 reorganizations.

4 Q. And you felt that the E & Y  
5 team, the experience of the E & Y team with  
6 respect to Tier One automotive suppliers, and  
7 experience in bankruptcies and reorganization  
8 was superior to that of the Deloitte team,  
9 right?

10 A. I would not say superior. I  
11 think all of the audit firms have extensive  
12 experience in a whole variety of areas,  
13 including bankruptcy, including technical  
14 aspects of accounting. They can all draw on  
15 experts across their firms. We are down to  
16 only four major auditing firms. They all have  
17 significant capabilities. E & Y was better  
18 positioned with Tier One experience and had  
19 current experience with ongoing  
20 reorganizations. And the specific team  
21 members they had assigned to our audit had  
22 experience with Tier One automotive suppliers  
23 in bankruptcy.

24 Q. Now, you said in your  
25 declaration, you expressed a concern in

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1 DELPHI CORPORATION

2 paragraph six of your declaration that because  
3 of work that E & Y did for Delphi in prior --  
4 in 2005 you were concerned that it would not  
5 qualify as an independent auditor for that  
6 year. Do you remember that?

7 A. Yes, I do.

8 Q. And what kind of work by E & Y  
9 were you referring to?

10 A. E & Y performed testing of  
11 controls under sarbain oxley 404. Because  
12 they performed that testing in 2005, they  
13 stopped that testing in 2005 and have not  
14 performed any in January of '06. They do not  
15 qualify as our independent auditor for 2005.

16 Q. Now, do you have an  
17 understanding as to whether an application has  
18 been made to have E & Y perform Sarbanes-Oxley  
19 evaluation and tax services in 2006 for the  
20 debtors?

21 A. I'm not aware of that  
22 application.

23 Q. And are you aware of an order  
24 signed by Judge Drain on January 5th, 2006,  
25 approving a retention of Ernst and Young to do

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Sarbanes-Oxley evaluation and tax services for  
the debtors effective nunc pro tunc to October  
8, 2005?

A. I'm sorry. Could you just  
repeat that?

Q. Are you aware of an order  
signed by Judge Drain on January 5th of this  
year, approving an application to have Ernst &  
Young perform Sarbanes-Oxley evaluation and  
tax services for the debtors effective nunc  
pro tunc to October 8, 2005?

MR. ROLL: Objection, Your  
Honor, I believe that question was misleading  
and informed by Mr. Butler that that order  
relates to an application that was filed prior  
to the application retaining Ernst and Young  
with respect to the 2006 audit. So, it sounds  
to me like we're getting into an apples and  
oranges kind of situation here.

THE COURT: Well, are you  
familiar with it?

MR. SABELLA: In listening to  
it, what I believe that application is, I  
don't --

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2 THE COURT: Well, no, only if  
3 you know. I don't want you to respond just to  
4 the debtor's counsel statement. But, if you  
5 know independently of that.

6 MR. SABELLA: If the  
7 application applies to 2005, it is the  
8 retention of E & Y to perform Sarbanes-Oxley  
9 and other work not associated with being an  
10 independent auditor for 2005.

11 BY MR. SABELLA:

12 Q. Now, in switching to Ernst &  
13 Young for the 2006 audit, it will be necessary  
14 for the E & Y team to review Deloitte's  
15 working papers and get up to speed on the  
16 audit issues previously encountered. Isn't  
17 that right?

18 A. I would believe that might be  
19 part of their transition efforts. There is a  
20 transition process the audit firms follow. I  
21 believe they each have somewhat unique  
22 transition processes, a lot of it is learning  
23 about the company from management and may  
24 include discussions with the prior audit --  
25 prior auditors. I believe that would be part

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1 DELPHI CORPORATION

2 of the normal transition.

3 Q. And whenever an auditor  
4 transition takes place, there's extra  
5 education and learning that the new firm has  
6 to do, right?

7 A. That is correct. And that's  
8 why these processes typically start in the  
9 first quarter of the year --

10 Q. Well, sir, I didn't ask you  
11 that question.

12 A. -- so it gives the audit firm  
13 time to perform

14 MR. SABELLA: Your Honor,  
15 could we get the witness just to answer the  
16 questions.

17 THE COURT: I'm sure the  
18 debtor's counsel would like you just to answer  
19 the question, too.

20 BY MR. SABELLA:

21 Q. Now, Mr. Dellinger, switching  
22 auditors at the end of the year, as opposed to  
23 early in the year, may compress the learning  
24 process, but it doesn't change how much the  
25 auditor has to learn, does it?

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2 A. That is correct.

3 Q. Sir, you never asked Ernst &  
4 Young at or about the time that they were  
5 retained for the 2006 audit, if they felt they  
6 could get up to speed quickly enough to do the  
7 2005 audit, did you?

8 A. I did not.

9 Q. And to the best of your  
10 knowledge, neither did anyone on the audit  
11 committee, right?

12 A. Not to my knowledge.

13 Q. And you've never worked in an  
14 auditing firm, right?

15 A. That is correct.

16 Q. And you don't have personal  
17 knowledge as to whether or not an auditing  
18 firm could get up to speed quickly enough to  
19 do a year-end audit if they were retained in  
20 December?

21 A. I don't have personal  
22 knowledge of having worked for an audit firm.

23 Q. Right. Now, in your  
24 declaration at the end of paragraph four, you  
25 state, quote, "In respect of Deloitte and

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1 DELPHI CORPORATION

2 Touche specifically, the firm has been working  
3 with Delphi for 10 to 11 months and all of  
4 that time and effort is part of the 2005  
5 audit. Do you remember saying that?

6 A. Yes, I do.

7 Q. Okay. Now, you were sitting  
8 here in the courtroom while Mr. Plumb  
9 testified that prior to April of 2005, little,  
10 if any, audit work had been done on the 2005  
11 audit. Do you recall that?

12 A. I did hear his testimony.

13 Q. Do you still stand behind the  
14 statement you made in your declaration that I  
15 read to you?

16 A. Yes, I do.

17 Q. And what is the basis for the  
18 statement in your declaration that the firm  
19 that had been working for 10, 11 months and  
20 all of that time and effort is part of the  
21 2005 audit?

22 A. I believe, and you'd have to  
23 refer back to his exact testimony, but he did  
24 parse the US audit effort from the  
25 international audit effort. We are a very



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large company. A 20-billion dollar company.  
All the work they do on the limited reviews  
quarter to quarter billed to the year-end  
audit. That's why audit firms are on-site  
year-round around the world, are performing a  
variety of reviews, and they all bill toward  
the year-end audit.

Q. Well, the statement in  
paragraph four of your declaration, are you  
referring just to overseas activities there?

A. I am referring to both  
overseas and U.S.

Q. Okay, so it's your belief that  
audit work on the 2005 audit was done in  
February and March of 2005?

A. I -- no, not in February and  
March, because they are still performing the  
2004 audit at that time for the fourth quarter  
and total year '04. But starting with our  
first quarter results, there is limited  
reviews performed by the independent auditors  
that review -- those reviews and their  
findings, concerns, audit adjustments, et  
cetera, are shared with me and are shared with

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1 DELPHI CORPORATION

2 the audit committee.

3 Q. Just so we're clear, sir.

4 When are you saying work relating to the 2005  
5 audit began by Deloitte and Touche?

6 A. I believe it would start in  
7 late March, early April.

8 Q. Is it fair to say, sir, that  
9 you cannot say with 100 percent certainty that  
10 all of the accounting errors and problems in  
11 prior years financial statements have been  
12 identified?

13 A. That answer is consistent with  
14 my deposition where I told you it would be  
15 impossible for me to guarantee with 100  
16 percent certainty that there are no errors or  
17 -- within our financial statements, of us --  
18 or for that matter, any other company I've  
19 ever worked for.

20 Q. So, there could still be more  
21 errors and more problems yet to be identified  
22 --

23 A. That is possible.

24 Q. -- in the prior years. Now,  
25 did you ever try to compare the expense of

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1 DELPHI CORPORATION

2 switching to E and Y for the 2005 audit with  
3 the financial consequences that might result  
4 to the debtors if Deloitte does the 2005 audit  
5 and tries to cover up any errors it finds in  
6 prior year financial statements?

7 MR. ROLL: Objection, Your  
8 Honor. There's no foundation for that at this  
9 point.

10 THE COURT: Well, it's also a  
11 compound question that I think you should  
12 break into two. And then I believe that the  
13 objection was to the second part of the  
14 question, but --

15 BY MR. SABELLA:

16 Q. Okay. You talked in your  
17 declaration about the expense to the debtor  
18 that might result if you switched auditors for  
19 the 2005 audit. You remember that?

20 A. That's correct. Yes, I did.

21 Q. And you're also aware that the  
22 plaintiffs have objected to the retention of  
23 Deloitte and Touche, arguing that Deloitte  
24 might have a conflict in that it might have an  
25 incentive to cover up errors it would find in

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1 DELPHI CORPORATION

2 prior years financial statements. Do you  
3 remember that?

4 A. I am aware that that is the  
5 lead plaintiffs' objection.

6 Q. Right. And my question to  
7 you, sir, is have you ever tried to compare  
8 the possible expense to the debtor -- the  
9 expense of switching to a new audit, on the  
10 one hand -- a new auditor, on the one hand,  
11 with the expenses and damages that might occur  
12 to the debtor if in fact the concern that the  
13 plaintiffs have materialize, i.e. Deloitte  
14 finding and covering up an error?

15 MR. ROLL: Your Honor, I  
16 object again. There's no foundation for the -  
17 -

18 THE COURT: Sustained.

19 BY MR. SABELLA:

20 Q. Is it fair to say that you  
21 don't know if plaintiffs' objection to the  
22 retention of Deloitte for 2005 was provided to  
23 the members of the audit committee?

24 A. I do not know if the exact  
25 objection was provided. The audit committee

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1 DELPHI CORPORATION

2 was aware that there were delays and  
3 objections raised relative to retaining D and  
4 T.

5 Q. And you never discussed with  
6 any member of the audit committee the point  
7 that the plaintiffs have raised about  
8 Deloitte's potential conflict of interest?

9 A. No, I did not.

10 Q. And you never raised it with  
11 anyone at Deloitte either?

12 A. No, I did not.

13 Q. And it's fair to say that  
14 prior to reading plaintiffs' objection, this  
15 is not a question you'd ever even given any  
16 consideration to?

17 A. That is correct.

18 MR. SABELLA: Nothing further  
19 at this time, Your Honor.

20 THE COURT: Okay. Redirect?

21 MR. ROLL: Yes, Your Honor.

22 Just briefly, if I may.

23 REDIRECT EXAMINATION BY MR. ROLL:

24 Q. Good morning, Mr. Dellinger.

25 A. Good morning.

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2 Q. You testified in response to  
3 Mr. Sabella's questions that you began work at  
4 Delphi as the chief financial officer around  
5 October 10, 2005. Do you remember that?

6 A. That is correct.

7 Q. Could you describe for us a  
8 little bit what your responsibilities are and  
9 have been since that date as the CFO?

10 A. I would say they are a broadly  
11 typical of other CFO roles I've had. Involve  
12 investor relations, although that is not a  
13 major concern at this time; the filing of  
14 financial statements, internal controls, the  
15 staffing and organization of the finance  
16 department, treasury, tax; I'm also  
17 responsible for customs across a large complex  
18 organization and because of our unique  
19 bankruptcy situation, obviously I spent time  
20 on issues such as this.

21 Q. Have you, prior to your work  
22 for Delphi, have you occupied similar  
23 positions at other public companies?

24 A. Yes, I have. I was a CFO at  
25 Sprint, a similar-sized 28 billion dollar

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1 DELPHI CORPORATION

2 company for three years.

3 Q. Okay. Anything in addition to  
4 that that --

5 A. I had 19 years of experience  
6 at GE, including five years in their internal  
7 audit group; I was CFO at, I think, eight or  
8 nine different businesses; I -- including a  
9 ten billion dollar business that did SEC  
10 reporting; and I was CEO of a three billion  
11 dollar company in Europe for General Electric.

12 Q. Okay. In performing your job  
13 responsibilities in each of those positions  
14 you've just described, did you have occasion  
15 to work with what I'll refer to and what  
16 people generally refer to as the Big Four  
17 accounting firms?

18 A. Yes. GE used KPM&G and so, I  
19 had experience throughout my GE career with  
20 them; Sprint, when I started, used E & Y and  
21 during my three years there, we transitioned  
22 to KPM&G.

23 Q. Are you familiar, as a result  
24 of your work and those positions you've  
25 described, with the costs charged by the Big

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2 Four accounting firms?

3 A. Yes, I am.

4 Q. And the extent of work that  
5 any of those firms would have to do in  
6 connection with the audit function of a public  
7 company?

8 A. Yes, I am.

9 Q. And is it fair to say that  
10 you're familiar with what it should cost,  
11 generally, for one of those firms to do the  
12 audit function with respect to a sizeable  
13 company about the size of Delphi?

14 A. Yes, generally, subject to the  
15 unique complexity and the global nature of it.

16 Q. Switching gears a little bit,  
17 Mr. Dellinger, Mr. Sabella asked you a little  
18 bit about the audit committee's determination  
19 to make a change to go with E and Y for the  
20 audit with respect to 2006. Do you remember  
21 that, generally?

22 A. Yes, I do.

23 Q. You began to speak a little  
24 bit about the audit committee's process for  
25 making that determination. Could you tell us



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2 a little more about how that process unfolded  
3 and how it was that the audit committee came  
4 to make the decision?

5 A. We proceeded to -- the  
6 company, at the direction of the audit  
7 committee, solicited proposals from the  
8 various audit firms. We participated in at  
9 least two pretty extensive meetings with --  
10 with each of the Big Four auditing firms,  
11 including Deloitte and Touche. We shared with  
12 them information and we gave the same  
13 information to all four of the audit firms in  
14 a -- in a data room, similar to what you do in  
15 a merger and acquisition transaction. And  
16 then on, I believe, it was December 6th,  
17 during an audit committee meeting, each firm  
18 came in and presented to the audit committee -  
19 - I was in attendance as well -- for  
20 approximately an hour, with the top members of  
21 the team that would be assigned to our  
22 account, and there was a give-and-take and a  
23 dialogue around their particular expertise  
24 relative to our issue, how they would perform  
25 audits and a variety of other subjects, and a

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2 decision was reached the following day by the  
3 audit committee.

4 Q. And just so we're clear, is it  
5 your view that based on what you know about  
6 the process and how it unfolded that Deloitte  
7 and Touche was given the same opportunity to  
8 make a presentation that the other firms were?

9 A. They were given certainly  
10 equal access to both management, to the audit  
11 committee and were given the same scheduled  
12 time to review their proposal, and, in fact,  
13 had an advantage because they knew Delphi  
14 better than any of the other firms, having  
15 been our audit since the spring.

16 Q. Do I understand correctly then  
17 at the end of those -- at some point  
18 subsequent to the completion of those  
19 presentations, the audit committee made its  
20 determination, correct?

21 A. After the completion of those  
22 proposals, the following day.

23 Q. Okay. To the extent you know,  
24 what was the basis for the audit committee's  
25 decision to go with Ernst & Young for 2006?

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2 A. Well, I think it was a  
3 combination of input from management, and  
4 their own perspectives on the proposals, and  
5 probably a prior experience they'd had with  
6 the audit firms. Most of them either had been  
7 on boards of companies or involved in  
8 companies, so had the experience with  
9 different firms. And I certainly provided  
10 them some of my sense of how I evaluated the  
11 proposals, both with strengths and weaknesses,  
12 and they reached a conclusion.

13 Q. And let me followup on that.  
14 And the basis of your -- what you know about  
15 the company and from your perspective as the  
16 Chief Financial Officer, do you concur with  
17 the audit committee's determination to go with  
18 Ernst & Young?

19 A. Yes, I do.

20 Q. And do you concur with what  
21 you understand to be the audit committee's  
22 reasons for going with Ernst & Young?

23 A. Yes, I do.

24 Q. Turning to a subject you  
25 touched on a little bit in response to Mr.

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Sabella's questions, is it your view that if asked, Ernst & Young could in fact do the 2005 audit?

MR. SABELLA: Objection, Your Honor. I mean, that's totally speculative as to what Ernst and Young -- they didn't ask, and now he wants to know what he thinks Ernst and Young's answer would have been if he had asked Ernst and Young, which he didn't.

MR. ROLL: Well, to be fair, Your Honor, I would bear on why he didn't feel it necessary to ask --

THE COURT: Well, let me ask it a little differently. In evaluating -- well, did Delphi evaluate the possibility of having another Big Four accounting firm perform the 2005 audit?

THE WITNESS: There was -- I remember one very brief conversation about it and I can tell you my personal views and the input I would have had to that conversation.

THE COURT: All right.

THE WITNESS: I believe it would have been impossible for any other audit

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firm to perform the audit and complete it in  
the time required to meet our commitments.  
And -- and let me just walk through some of  
the issues that arise. First of all, all of  
the other audit firms have done non-audit work  
for us: tax, 404, PWC had done some forensic  
work that quite probably would disqualify them  
from being our independent auditor from '05.  
That's impossible to prove without them going  
through a pretty extensive exercise internally  
using their lawyers and other capabilities  
they have to evaluate independence. Certainly  
E & Y would not be qualified to do the 2005  
audit because they had performed significant  
amount -- I think, 40,000 hours worth of  
Sarbanes-Oxley testing on the behalf of  
management. Therefore, they could not be our  
independent auditors. We would have seen a  
dramatic increase in cost because we would  
have paid E & Y for roughly ten months worth  
of auditing and then had to pay another firm -  
-

THE COURT: You mean,  
Deloitte, right?

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2 THE WITNESS: I'm sorry, yes.

3 We had paid Deloitte for ten months of the  
4 audit and would have had to pay another firm  
5 to duplicate that work. And I think it would  
6 be impossible for a new audit firm stepping in  
7 at least at the date I arrived at Delphi -- so  
8 October 10th -- to have any chance to complete  
9 the full year '05 audit within the SEC  
10 required 75 days, plus you're allowed a 15-day  
11 extension. That's 90 days total. That takes  
12 you to March 31st of '06. I don't believe  
13 that's possible. So, it was not anything that  
14 was seriously considered. If the conversation  
15 ever came up, I would have been very strong  
16 saying that's not possible.

17 BY MR. ROLL:

18 Q. All right. And just following  
19 up --

20 A. And our failure to file those  
21 financials on time is a violation of our DIP  
22 covenant, which could result in a whole series  
23 of negative consequences to the estate.

24 THE COURT: Did any of the  
25 three Big Four firms that participated in the

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2 beauty pageant, other than Deloitte, propose  
3 doing the 2005 audit?

4 THE WITNESS: No, none of them  
5 proposed doing the 2005 audit.

6 THE COURT: Okay.

7 BY MR. ROLL:

8 Q. Are you able to know, Mr.  
9 Dellinger, why that was?

10 A. Well, likely for several  
11 reasons, but --

12 THE COURT: Well, without  
13 speculating.

14 THE WITNESS: I don't know  
15 without speculating.

16 BY MR. ROLL:

17 Q. Well, looking at that issue,  
18 but without speculating upon what was in their  
19 minds, did you have anything in your mind at  
20 that point as to whether any of those other  
21 firms could in fact do the audit?

22 A. My view then and my view now  
23 is that they would not be able complete the  
24 audit in anywhere near the time required to  
25 meet our commitments. And quite probably,

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would not qualify under independent standards to be an independent auditor for 2005. And the independent rules are quite complex and quite detailed under our current Sarbanes-Oxley environment and the current corporate governance environment. Very difficult to clear.

Q. You testified a few moments ago that you thought, in essence, it would be impossible for another firm to come in and do the 2005 audit in time. I mean, let me get to the cost aspect of that. Do you have a view based on your experience in dealing with Big Four accounting firms and paying their bills on behalf of big public companies over the years in connection with audit work? Do you have a view on what it would cost the estates for a replacement firm, that is, someone other than Deloitte and Touche to come in now and do the 2005 audit?

A. I believe a reasoned guess is the amount of money we spent with D and T up to filing for bankruptcy, or was paid to them, which I believe is somewhere approaching ten



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million dollars, would be totally lost, would have to be replaced with expenditures with a new audit firm. In addition, if there was any chance to try and complete the audit, even in a six or nine-month period, I believe you would have to expend upwards of an additional ten million dollars, plus the audit fee for the remaining period. I think you're talking 20 million up for the extra work of replacing D and T for '05 and trying to complete the audit in a reasonable manner. But that is simply my estimate.

Q. Okay. A few moments ago, at the tail end of one of your answers, you referred to potential problems with respect to, I believe you said, covenants in the DIP facility that are in possession financing?

A. That's correct.

Q. Could you explain what you meant by that?

A. Yeah. Our DIP covenants require that we be a timely filer with the SEC, as I mentioned earlier, you're required to get your 10K done 75 days after the end of

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your calendar year. Our calendar year is December 30th. That puts us at approximately March 15th. And you are allowed an automatic 15-day extension upon request. That would take us 90 days out 'til March 30th. Failure to meet that date, I think, would raise concerns. Certainly, it'd be a breach of our DIP covenant and could have ramifications, potentially significant, as well as would raise issues with a variety of other constituents: customers, suppliers, employees, communities in which we have facilities.

Q. Other than what we've touched on already, Mr. Dellinger, are there in your view any other problems that would arise if another firm were asked to come in at this point and do the 2005 audit, given where we stand today?

A. Well, as I mentioned, I'm not sure any of them could do it. That is, they wouldn't qualify as independent auditors, the cost would be significantly higher than a normal transition beginning in a first-quarter

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period, which is what we are proposing is to bring E & Y in starting in January to begin learning our business and performing the '06 audit. It's been my experience in a transition I went through at Sprint that we brought KPM&G in in January. And our financials, I believe, would be significantly delayed and potentially we might not even find a Big Four firm that could perform the work, 'cause none of them would qualify under independent standards.

Q. Final topic, Mr. Dellinger, you were asked a few questions by Mr. Sabella about the team, the composition of the audit team that Deloitte proposes. Based on what you know about that team, and the people on it, and based on what you know about the past, are you satisfied that the team as constituted, or as proposed to be constituted by Deloitte is sufficiently different from the groups that worked on prior financial statement audits?

A. Again, since I wasn't here prior to October 10th, I can't match up

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individuals. I am aware, as Brock Plumb described both in his affidavit and, I believe in his testimony, that there's been changes of key members of their -

- of that team. My personal experience in dealing with the senior members of the Deloitte and Touche team over the last three months has been that they are a highly qualified team, are very engaged in our complex set of issues, and are committed to performing a professional audit.

Q. As you sat here in the courtroom earlier and listened to Mr. Plumb's testimony, did you hear him describe what he - the type of decision, auditing decision, he considered to be a major one in the context of a big audit?

A. Yes, I did.

Q. Are you confident, Mr. Dellinger, that those kinds of decisions, all of those kinds of decisions that may need to be made in connection with Deloitte's audit of the 2005 financial statements at Delphi will be made by the senior people, as he described it on the team?

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2 A. My evidence to date, again  
3 over the last three months, is first of all, I  
4 personally share anything I'm concerned about  
5 or I believe is a big issue, with D and T and  
6 Brock, and Jeff, in particular, do the same  
7 with me. And we get together on a reasonably  
8 frequent basis to discuss the audit, to  
9 discuss our closing, to discuss various  
10 issues, and I have seen no evidence that  
11 there's any topics we're not talking about  
12 that we should talk about.

13 Q. Is there any aspect of Mr.  
14 Plumb's qualifications and experience that  
15 you're concerned about --

16 A. No, I have no concerns.

17 Q. Are there any concerns that  
18 you have about the qualifications and  
19 background of Mr. Steiner?

20 A. My contact with Mr. Steiner  
21 has been fairly limited over the last three  
22 months.

23 MR. ROLL: Thank you. I have  
24 nothing further, Your Honor.

25 THE COURT: Okay. All right.

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Let me just ask you a couple of questions myself. You heard the lead plaintiffs' counsel, I believe, ask you whether you're generally familiar with the lead plaintiffs' allegation that D and T has a conflict of interest because they participated in the audits of financial statements that were subsequently restated. Is that right?

THE WITNESS: Yes, I'm aware of their allegation.

THE COURT: Am I right to understand your testimony that the potential for such a conflict was not a factor in replacing D and T with E & Y for 2006 and going forward?

THE WITNESS: No, that was not a factor.

THE COURT: Having heard the allegation that there's a conflict, and considered it, why is the debtor not concerned that in performing the 2005 audit, D and T might not, in the plaintiff's words, cover up material issues, to protect itself in respect of the earlier activity?

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THE WITNESS: Well, first of all, again this is my perspective is I don't view they have any incentive to cover up things. And, first of all, it would require that I produce financial results that are intentionally incorrect. You know, the books and records of the company are my responsibility, my team's responsibility to produce. D and T is simply auditing those books and records. And, you know, insuring that from their -- their reviews that to the best of their capabilities, they're accurate and fairly represent the business. Certainly, my job to produce the original records. And I believe we do that with significant dedication in an effort to ensure that our new restatements there are no intentional errors in there. Again, I cannot guarantee with 100 percent certainty that they're right. These are big, complex organizations. You have to rely on systems, controls and a variety of people -- but we certainly work very diligently to make sure they represent the business and are true and accurate, and all

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the evidence I have is that D and T does the same in their audit. And I don't personally see any reason why they would have an incentive to hide things that I put in the records that were incorrect. And I know I have no incentive to put things in the records that are incorrect.

THE COURT: Okay. Any further questions?

MR. ROLL: No, Your Honor, thank you.

THE COURT: All right, you can step down, sir.

THE WITNESS: Thank you.

MR. SABELLA: Your Honor, from an evidentry perspective, the only other thing that the lead plaintiffs would do would be to send Your Honor a copy of the transcript of the deposition that Deloitte administered here a couple of days ago. We don't have it yet. We would have called them here, but the debtors didn't want to produce them, so I might as well get the transcript and send it to Your Honor for what it's worth.



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2 MR. ROLL: Your Honor, it's --

3 well, I have a couple of reactions to that.

4 One is, Mr. Sabella is correct that we don't

5 have the final version of the transcripts.

6 All we have is a rough version and I would say

7 that the characterization of it as rough is

8 accurate, and we will need to, and the witness

9 will need to go over the final text to ensure

10 that it really is a transcription of what

11 transpired. That's point one. It's part of

12 housekeeping thing I guess.

13 On a more substantive level, I

14 would object to their sending the transcript

15 to the Court wholesale and asking the Court to

16 read it wholesale for any and all purposes.

17 As Your Honor well knows, there was a lot of

18 debate last week about what they could and

19 could not get into at that deposition. And

20 there were instances where, with all due

21 respect to them, they did cross the line, be

22 it we made objections, --

23 THE COURT: I'm sorry, which

24 deposition is this?

25 MR. ROLL: This is the

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deposition of Robert Rust, the chairman of  
Delphi's audit committee, --

THE COURT: Right.

MR. ROLL: -- which Your Honor  
addressed at the hearing last week. And which  
went forward in accordance with Your Honor's  
direction but--

MR. TENZER: Limited to the  
topics.

THE COURT: Well, was there  
any agreement that the parties would rely on  
the deposition and therefore not have Mr. Rust  
appear today?

MR. TENZER: Well, there was  
not agreement per se. But, Your Honor quashed  
the subpoenas themselves requiring Mr. Rust  
and any other members of the audit committee  
to show up here today. I was asked at the  
conclusion of the deposition by one of the  
lead plaintiffs' counsel, not Mr. Sabella, who  
was not there, whether we, the debtors,  
intended to put Mr. Rust on and use his  
testimony live on direct at this hearing. And  
we said that was not our intention. We were

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2 producing him only for the deposition in  
3 response to their desire to have the  
4 deposition. So, there was some back and forth  
5 on that as to whether to what extent we were  
6 required to have him here in face of those  
7 facts. Now, as the quashing of the subpoenas  
8 and our telling them that we were not going to  
9 use them affirmatively and so, I don't think  
10 there was an agreement. I think they clearly  
11 understood that we were not going to be  
12 relying on Mr. Rust's testimony themselves in  
13 connection with this. We've always thought it  
14 was unnecessary.

15 THE COURT: Well, following  
16 his deposition, was there a request to have  
17 him appear on the plaintiffs' part?

18 MR. TENZER: There was an  
19 assertion made by the lead plaintiffs' counsel  
20 who were there that we were required by the  
21 terms of what Your Honor had done last week to  
22 have him here today. We respectfully  
23 disagreed with that, and the order that Your  
24 Honor subsequently signed, that is subsequent,  
25 or at least we saw, subsequent to that

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2 colloquy, confirmed that we were right.

3 In any event, we made that  
4 point to lead plaintiffs' counsel that we  
5 don't believe that we're required to have him  
6 here and we're not going to have him here.  
7 They said -- I'm getting into this because  
8 Your Honor was asking about this; I,  
9 otherwise, would not raise this. They said,  
10 we will then serve him right now with another  
11 trial subpoena to show up on Friday. I said  
12 to them, I would advise you respectfully not  
13 to do that because we would take that as a  
14 direct violation of the Court's order quashing  
15 the subpoenas and we would be duty-bound to  
16 seek appropriate sanctions for that. They  
17 caucused, they came back, and they said,  
18 uokay. We will not serve another subpoena and  
19 we will not, therefore, seek to compel him to  
20 show up here today.!

21 THE COURT: All right. I'll  
22 review the deposition. Obviously, it's a  
23 deposition. I'm sure you reserved, you made  
24 the normal reservations at the start of the  
25 deposition. I normally rule from the bench,

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2 particularly given the speed that bankruptcy  
3 cases need to be determined. Is there  
4 anything particular in the deposition you want  
5 me to be aware of?

6 MR. SABELLA: Well, I would  
7 say that the highlights from my perspective  
8 that the audit committee made known that --

9 THE COURT: I'm sorry, can you  
10 pick up Mr. Sabella on the microphone? Is he  
11 showing up?

12 MR. SABELLA: I would simply  
13 say that I think the highlights of it are:  
14 one, that the audit committee made no  
15 investigation, didn't ask any questions about  
16 the qualifications or competency of the  
17 members of the audit team. They left that to  
18 Mr. Plumb.

19 THE COURT: Okay.

20 MR. SABELLA: Two, that they  
21 made no inquiries of any of the firms that  
22 they interviewed as to whether or not any of  
23 them thought they could actually do the 2005  
24 audit.

25 And three, they gave no

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2 consideration to the conflict of interest  
3 point that we've raised.

4 THE COURT: All right. Do the  
5 debtors really -- the latter point, there's  
6 already been testimony to that effect, the  
7 last of those three points. Did you dispute  
8 the other two?

9 MR. TENZER: I dispute Mr.  
10 Sabella's characterization of what was much  
11 more like the testimony on those subjects.  
12 And I would say, with all due respect to Mr.  
13 Sabella, if those points were really such  
14 highlights, I think we would have actually  
15 seen an effort by -- to represent the actual  
16 testimonies recorded today from the  
17 transcript. We didn't see that. I'm feeling  
18 a little sandbagged here. They also know that  
19 it's important to the estates to get as  
20 expedited a ruling on this application as  
21 possible for them to suggest, that, oh well,  
22 Your Honor, you should also look at this,  
23 which we'll send to you when we get around to  
24 it --

25 THE COURT: Well, what were

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2 the first two points again?

3 MR. SABELLA: That the audit  
4 committee made no investigation into the  
5 qualifications or credentials, competency of  
6 the audit team, left the composition of the  
7 team solely to Mr. Plumb. And secondly, that  
8 they didn't ask any of the other three firms  
9 that they interviewed whether they felt they  
10 could complete the audit of 2005 in a timely  
11 fashion.

12 THE COURT: All right. Well,  
13 that one's been discussed, too. All right.  
14 Frankly, I -- All right. I'll reserve this  
15 whether I need to see the deposition. Based  
16 on what I've heard as to what you want to use  
17 it for, the information's already, I think, in  
18 the record or something that I can infer. Or,  
19 that may not be particularly relevant, so --

20 MR. TENZER: Your Honor, maybe  
21 I can help a little bit here. For purposes --  
22 if it will help expedite the Court's  
23 consideration of this issue and allow for Your  
24 Honor to rule from the bench at some point  
25 today which you just said, which the Court

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2 just said is the preference, we would be  
3 willing to stipulate to those particular  
4 points. I don't think Your Honor actually  
5 needs to see Mr. Krust's testimony for further  
6 application of that deposition.

7 THE COURT: Okay. All right.  
8 That's fine.

9 MR. TENZER: I just don't want  
10 to see it slow things down, that's all I'm  
11 saying.

12 THE COURT: Okay. All right.  
13 Very well. Okay, so I think it's Mr. Tenzer's  
14 turn again.

15 MR. TENZER: Thank you, Your  
16 Honor. Some of what I was going to argue in  
17 court earlier has been stated, so I will try  
18 to not repeat what's gone on here too much,  
19 and frankly, will not be professionally or  
20 personally insulted if the Court says that  
21 point's been made and you ask me to move on.

22 THE COURT: Okay.

23 MR. TENZER: I do want to make  
24 a couple of notes to summarize the record and  
25 frankly, the law because I think it's clear



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2 that Deloitte is competent, they're  
3 disinterested, we need them to do this work,  
4 and that the application should be approved.

5 It's clear from the record,  
6 both today and prior to today, that we need an  
7 auditor. We got to make our SEC filings,  
8 we've got to comply with our DIP covenants,  
9 and more important, maybe even those  
10 contractual and legal obligations, we have to  
11 make sure that the key players in this case:  
12 our customers, our suppliers, our employees,  
13 don't lose confidence in this company and  
14 derail the lead organization because there  
15 aren't audited financial statements.

16 Also, heard, and the record is  
17 extensive about how Deloitte is the only  
18 auditor in a position to do that. Delphi  
19 operates in just about every major  
20 industrialized country in the world. It's a  
21 widespread, complicated business, and Deloitte  
22 has been doing year-round work that is either  
23 specifically audit work or is going to be used  
24 in the audit work, and if Deloitte could not  
25 complete the audit, there's no assurance that

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2 can be given that any other firm is going to  
3 be able to complete the audit.

4 Perhaps more importantly,  
5 there isn't even any firm that would be  
6 available to conduct that audit because that  
7 firm, as we've heard today, might not qualify,  
8 probably would not qualify, as independent, as  
9 required by law to audit the debtors' books.

10 And, most importantly, Your  
11 Honor, there would be substantial additional  
12 cost to these estates if Deloitte was not  
13 retained, and that cost would go towards the  
14 end of, as you heard Mr. Dellinger say, not  
15 getting the audit done on time anyway.

16 So, it is in the estate's  
17 interest to have an auditor retained, and  
18 specifically, to have Deloitte retained to do  
19 the 2005 audit and certain other work that  
20 they've been doing. They obviously will not  
21 be doing work beyond -- the annual audit work  
22 beyond 2005, as has been stated.

23 I also think it's important,  
24 Your Honor, to understand the context in which  
25 this application comes to you. The major

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constituents in the case recognize the need to retain Deloitte. The United States trustee, which is primarily charged in bankruptcy cases, which with reviewing professional conflicts issues, has an objective. The creditors' committee filed a limited objection. As I represented to you earlier, those issues have been resolved and on an overall basis, they support the retention of Deloitte. No other creditor, shareholder or stakeholder has showed up to contact -- to contest the application. The only people that are standing up and are doing it are the lead plaintiffs. And the lead plaintiffs' primary interest is not in reorganizing these estates for the administration of these cases, it's in being lead plaintiffs. It's in recovering the most money in their securities litigation that they can recover for themselves and their putative class. And that agenda should not override the debtors' need to have auditors, to have Deloitte and the considerations of the other major players in this case. And, as we've seen in their papers, and as we've heard

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today, their objections are based entirely on allegations, and at this point, all they are is allegations based on conduct that occurred a significant time in the past. Your Honor again heard testimony today that the significant aspects of the restatement relate to the years 2001 and prior. Even if they went up to 2003, which are years that technically were restated, it's two and a half, three years in the past, at minimum. And whatever happened in the past, we have a different Deloitte team in place, they're clearly competent, they're necessary to do the work, they're disinterested, and the application should be approved.

If you look in the lead plaintiffs' papers, they raise a couple of objections which can broadly be characterized in two, maybe three, categories.

The first one is based on competence. Clearly, Your Honor, a professional that's retained under Section 327a of the Bankruptcy Code has to be able to fulfill its fiduciary responsibilities to the

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estate, and that's something that Delphi takes very seriously. But, there is nothing at 327a or 101-14, or in the cases that we've cited, or frankly, in the cases that the lead plaintiffs cite that say that allegations of things that were done pre-petition are sufficient to render a professional incompetent. Some of the cases that they've cited don't deal with competence at all. They deal with things like indemnities and retainers, and I'm not going to waste the Court's time with those. But, even the cases that they cite that deal directly with competence deal with the ability of the professional in question to do what the professional is being asked to do in the confines of the Chapter 11 case. In the Sieberg case, you had a lawyer that wasn't retained because the lawyer didn't know that you had to get --

THE COURT: Okay. You can move off that one.

MR. TENZER: I'll go on.  
Okay? So, let's look at what we have. You've

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heard testimony today and you've seen the affidavits. The decision makers for Deloitte were not around for the restatement. Mr. Plumb wasn't around. Mr. Van Arsdale wasn't around. Mr. Steiner wasn't around. Okay? And the core team was not there. The people that work under them, those that may be making decisions, had been vetted by Deloitte, they were not involved. As Mr. Plumb put in his affidavit in the transactions surrounding the audit. The core team, the decision makers, the people that ultimately will be signing off on the audit in this case were not around.

As to the junior people who rotate on and off all the time, you heard Mr. Plumb say they don't make the decisions. He does. He's new. He is not as, I think, the lead plaintiffs would put it, tainted in any way by the restatement, and he is clearly competent based on his knowledge and his experience to do the audit.

I would also note, Your Honor, that the debtors have a primarily different senior management team in place, as well,

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2 overseeing the audit. You heard about Mr.  
3 Dellinger. He's new. The CEO is new, the  
4 general counsel is new, and other people are  
5 in place and others have left.

6 There's simply no basis to  
7 believe, based on Mr. Plumb's experience,  
8 Deloitte's reputation as a firm, the change in  
9 composition of the team, that they're not  
10 competent.

11 The other primary category of  
12 objections that they raised is that Deloitte  
13 is not disinterested, is not a disinterested  
14 person who otherwise has an interest adverse  
15 to the estate in violate of Section 327a.  
16 Your Honor, the legal standards have been set  
17 forth in our papers and theirs, and I won't  
18 dwell on them, but I would note that it's  
19 clear from the law in this circuit that the  
20 mere fact that someone can concoct or conceive  
21 of places where someone would be adverse does  
22 not in and of itself rise to the level of  
23 creating a disinterestedness problem for a  
24 professional.

25 Let me go through, briefly,

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their allegations as quickly as I can, one by one. They suggest that the mere fact that Deloitte is retained is going to create an appearance of impropriety. Well, I don't believe that to be the case. First of all, this company was not, in spite what the lead plaintiffs might want Your Honor to believe, forced into bankruptcy by the allegations that they've made with their restatement. There is an uncontroverted record in this case that Delphi filed for bankruptcy to address its legacy liabilities, because its customers aren't buying as much products as they used, and because the cost of commodities have gone up.

In addition, Your Honor, what there has been, is there has been a restatement. And the fact that there has been a restatement doesn't in and of itself, as the lead plaintiffs would have you believe, mean that as a matter of law there's been fraud or wrongdoing of any kind. Restatements happen on a smaller scale in an ordinary course of business all the time. You're dealing with a



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county here. You're dealing with a complex company. Both of those things are not always easy to evaluate. You have subjective accounting standards. You have different accountants that might come to different conclusions about things. You can't make a leap from [there's been a restatement] to [there is automatically a problem.]

More of their emphasis though, Your Honor, is on conflicts. And in particular, what they seem to be concerned about is Deloitte is not going to dig deep into the company, check under the hood, kick the tires and do everything else they need to do in connection with their audit, because they're covering up for themselves, they're covering up for their clients, or they're covering up for co-defendants in the securities litigation. There's no evidence that the Deloitte are going to do that. Again, you have experienced auditors. But, look at what Deloitte did prior to bankruptcy. Deloitte signed off on the restatement. Deloitte did that knowing full well that when

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it was signing off on the restatement, it was restating years for which they had done prior audits. They didn't cut and run, like the committee suggests they might during the Chapter 11 case. They've done the exact opposite. They've done what a professional would do. And they've done what we have every indication they will do in this case. They've done their job. They've acted like professionals.

I would also note, Your Honor, that in addition to, I believe in Deloitte acting professionally and having no incentive to do what it is they're being accused of. There is a little bit of oversight here. We have Your Honor, we have a creditors' committee, we have a U.S. trustee, we have other professionals in these cases, and I take most notably, we have the lead plaintiffs. Deloitte noticed that all of those people are going to be watching and it wouldn't be in my mind particularly prudent for them to do things to cover their tracks when all those people are watching.

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2 I would also note, Your Honor,  
3 that this notion of a cover-up, of not doing  
4 their job. Let's remember, Deloitte signed  
5 off on this restatement in our post-Enron,  
6 post-WorldCom, post-Adelphia, Sarbanes-Oxley  
7 world. I don't represent Deloitte, but I'll  
8 bet a dollar they thought that if they signed  
9 off on the restatement, they might get sued.  
10 They signed off on it anyway. Again, they  
11 didn't cut and run. There's no reason to  
12 assume that they're going to do anything  
13 different in these Chapter 11 cases.

14 We've heard a lot about E & Y.  
15 Why wasn't E & Y retained? Why can't E & Y do  
16 this? In addition to the difficulties in  
17 getting the new auditor on board that we've  
18 heard about, it's important to emphasize again  
19 that, as Mr. Dellinger has testified  
20 repeatedly, he didn't think that E & Y could  
21 do the work because they're not independent.  
22 So, this idea that they didn't investigate E &  
23 Y or evaluate the cost of E & Y doing the  
24 work, which would be substantial, is kind of a  
25 red herring for Delphi to have done all that

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2 work when E & Y couldn't be retained anyway,  
3 would have been a colossal waste of time.

4 Nor can we take the fact, Your  
5 Honor, that E & Y has been chosen for the 2006  
6 audit and somehow use that as the lead  
7 plaintiffs do in their papers to suggest that  
8 the Delphi board, or the audit committee, has  
9 lost confidence in Deloitte.

10 If I could, Your Honor, I'd  
11 like to read from the 8K that Delphi filed on  
12 December 19th of 2005 when the change was  
13 announced. It's going to be one sentence  
14 which says, μThe change was not the result of  
15 any disagreement between Delphi and Deloitte  
16 and Touche on any matter of accounting  
17 principles or practices, financial statement  
18 disclosure, or auditing scope or procedure or  
19 any decision by Deloitte and Touche to resign  
20 or refuse to stand for re-election.||

21 As Mr. Dellinger stated, the  
22 company and the audit company went through a  
23 process, they invited Deloitte and Touche to  
24 participate in that process, and at the end of  
25 the day, they made an evaluation that they

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2 wanted to go with E & Y. That business  
3 judgment cannot be used to cast aspersions on  
4 D and T or otherwise render them not  
5 disinterested in this case.

6 The lead plaintiffs bring up  
7 issues about claims. There were questions  
8 about claims and waivers today. Again, Your  
9 Honor, the law is very clear. Just because  
10 you can envision a circumstance where some  
11 time in the future, there could conceivably be  
12 claims bought, that's not enough to render  
13 someone not a disinterested person, or having  
14 an interest adverse to the estate.

15 And you've heard the testimony  
16 that there are no known claims, you've seen  
17 the affidavits in which to the extent Deloitte  
18 has claims for pre-petition fees, which were  
19 de minimis, they've been waived. There's no  
20 indemnity provision in the audit letter, and  
21 again, on a going forward basis, 90 percent of  
22 what they're going to be doing and what  
23 they've done in the past is related to audit  
24 work, that, to me, Your Honor, is not an issue  
25 that renders them not disinterested.

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2 In addition, Your Honor, they  
3 make some statements in their pleadings about  
4 there should be more information. Well,  
5 between the discovery and the testimony and  
6 most importantly, Your Honor, the supplemental  
7 disclosure that the United States trustee  
8 asked for and was provided by Deloitte, I  
9 think we've satisfied that.

10 I'd like to leave, Your Honor,  
11 with just a couple of final thoughts. Again,  
12 it's clear that from a timing perspective and  
13 from a necessity perspective, we have to have  
14 an auditor, and we have to have Deloitte. The  
15 allegations that the lead plaintiffs does not  
16 believe that they can say, "Aha, there's been  
17 a restatement, therefore, something's wrong".  
18 There's been a restatement. That's all that's  
19 happened.

20 And I would leave, Your Honor,  
21 again, with a thought that Judge Gonzales in  
22 the WorldCom case, which is that -- that case  
23 is, in some sense is here fashionably similar  
24 and in some sense is different, but two of the  
25 things that concerned the Judge in that case -

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2 - I would respectfully ask the Court to be  
3 mindful of here. One was the agenda of the  
4 people who were bringing the objection; and  
5 two, would be the harm to the estate, where in  
6 that case there would be a disqualification;  
7 in this case, a failure to approve the  
8 application.

9 Thanks, Your Honor.

10 THE COURT: Okay.

11 MR. SABELLA: Your Honor,  
12 perhaps I would begin with the not-so-subtle  
13 subtext of Mr. Tenzer's argument, and that is  
14 that because we're just a couple of securities  
15 plaintiffs, somehow we're not to be taken too  
16 seriously.

17 Lead plaintiffs here are four  
18 gigantic institutional investors. Government  
19 retirement pension plans. This is not someone  
20 with a hundred share; these are people with  
21 hundreds of thousands of shares. These are  
22 major institutional investors. And I was  
23 terribly surprised by one of the last things  
24 Mr. Tenzer said when he said there's been a  
25 restatement here. That's all that's happened.

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2 No, that's not all that's  
3 happened. You've had people fired. You have  
4 an SEC investigation. You have a Department  
5 of Justice criminal investigation. This is  
6 not a case where one could say, well, there's  
7 just a few allegations out there. It is  
8 meaningless. This is a serious, serious  
9 matter.

10 Now, I would also start by  
11 mentioning that when you consider the  
12 objection to Deloitte, you have to consider  
13 the burden here is on the debtor to prove that  
14 the retention of Deloitte is in the best  
15 interest of the estate. And to the extent  
16 that there are gaps in the proof, it is their  
17 burden and not mine.

18 As Mr. Tenzer mentioned, we've  
19 made two points. The conflict point and the  
20 competency point. And I'm not going to really  
21 go over the law very much. I mean, that's in  
22 the papers. But let me start just briefly  
23 with the conflict point and the fact that the  
24 potential claims back and forth giving rise to  
25 an incentive to perhaps not dig as deeply as



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one might otherwise dig. He somehow suggests that because there is litigation, that's going to give them an incentive to bring things to light. The logic there escapes me, Your Honor. Deloitte is being sued by the lead plaintiffs. They are probably going to be sued by the debtor or the unsecured creditors' committee. The likelihood that that gives them an incentive to bring up more things that they did wrong in prior audits just defies reason. And as Tenzer argues that Deloitte signed off on the restatement, and they should get some extra credit for that. Well, the fact is Deloitte didn't instigate the investigation. The SEC did. And Deloitte had very little alternative but to sign off on the restatement. I don't think they get any extra brownie points at all.

THE COURT: I was going to ask Mr. Tenzer the same question, but where is the evidence on who signed off and who brought and who didn't bring the restatement and who was behind it?

MR. SABELLA: I'm not sure

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2 there's anything in the record, Your Honor,  
3 but it's his burden.

4 THE COURT: Okay.

5 MR. SABELLA: Let me talk  
6 about -- I want to talk more about competency  
7 and then I want to talk about the prejudice  
8 argument.

9 Starting first with  
10 competency. If Your Honor, and I'm sure Your  
11 Honor did, read the affidavits by Mr. Plumb  
12 and the declarations by Mr. Dellinger, I'm  
13 sure you got the impression that I did when I  
14 read them that the entire audit team had  
15 changed over. Now Mr. Dellinger says that  
16 specifically, and Mr. Plumb implies, because  
17 he doesn't talk about anyone who is a  
18 holdover. But then you heard the testimony  
19 today that there's three people at the top who  
20 are new, and everybody else -- all of the  
21 managers and the seniors and the staff people,  
22 to the extent that he knows who they are, and  
23 he doesn't even know who all of them are, are  
24 all holdovers in one form or another, some  
25 going back as far as 2000 and 2002 and 2003.

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So, the notion that it's an entirely new audit team just isn't supported by the facts. Now, it's true, the senior people have changed. And he says that the people -- Mr. Tenzer said in his argument, well the people who are still there, these dozens of people, or hundreds of people, however many they are who worked on the prior audits, they don't make the decisions. That may be true in terms of what is the audit opinion going to say. The broad significant decisions that Mr. Plumb talked about. But they do make the errors. They're the ones who are on site at the client's premises. They're the ones who look through the records and either identify or don't identify suspicious transactions. If they don't bubble it up to Mr. Plumb, or to Mr. Van Arsdale, there's no significant decision to be made at that level. And the critical point here is we don't know why Deloitte got it wrong. We don't why the reason for the restatement was that some staff accountant or some field senior or some manager didn't understand the transaction he was looking at.

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2 He didn't put it on a point sheet and send it  
3 up to the partner and say, I'm troubled by the  
4 way this is characterized. We don't know if  
5 that's where the error occurred, or if  
6 occurred at the engagement partner level. And  
7 we didn't get any discovery into that. And  
8 they didn't put any evidence in on that.

9 THE COURT: Well, in looking  
10 at the summary of the allegations from the  
11 various complaints about the restatement, I  
12 try to consider whether the restatements were  
13 matters where there was information that was  
14 hidden that really did require sort of  
15 forensic digging, that there was the type of  
16 fraud that the person on the street thinks of  
17 as fraud, one transaction being xeroxed and  
18 counting as twenty with just the signatures  
19 changed, and it wasn't clear to me that that  
20 was the case in looking at the subparagraphs  
21 2a through e in the objection. It seems to  
22 me, looking through those items that they're  
23 more the type of judgment calls that  
24 accountants make about -- well, in the first  
25 instance, whether a financing is a sale of

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inventory or of indirect materials; whether  
the transaction with GM was a warranty payment

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- or should be misclassified as warranty  
payments; and adjustments to pension. And, at  
least in respect of those two, and then also  
what's set forth in e is with respect of  
inventory -- now maybe c and d are more things  
that are more of where you dig as opposed to  
you make judgment calls. But, how do you  
respond to that?

MR. SABELLA: Well, even with  
the pension plan warranty one, I mean, we  
don't know exactly what happened, but it is, I  
suppose, conceivable that it was presented to  
the partner -- you know, here's all the  
details on this payment, how do you want to  
characterize it? I think it may be equally  
likely that the people on the scene did not  
appreciate when they looked at the records  
what the payment was for and didn't question  
what the payment was for. I mean, we don't  
know exactly at this point where that error  
was. I mean, it's conceivable that it could  
be at any level.

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2 THE COURT: All right. But,  
3 assuming -- even assuming that's the case,  
4 it's something that happened. I'm not sure  
5 when it happened. It apparently happened at  
6 least two or three years ago. How can I, or  
7 how should I take away from that that there'll  
8 be something related to it today in connection  
9 with the 2005 audit that will lead them to  
10 alter their normal behavior.

11 I'm talking about the conflict  
12 point now. I understand you argue that this  
13 is evidence that they're not competent.

14 MR. SABELLA: Right.

15 THE COURT: But on the  
16 conflict point, I'm not sure how these  
17 identified practices that are listed here are  
18 the types of things that you even can copper  
19 up at this point.

20 MR. SABELLA: Well, if they  
21 were to find, for example, that that problem -  
22 - that there were other similar types of  
23 payments that they booked as pension payments  
24 that were in fact warranty payments, or that  
25 there was more money here involved in this

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transaction than has been reported, I mean those kinds of things. They could find, in looking at the books and records, that these kinds of problems are only symptomatic of more problems that existed in those financial statements, similar kinds of mischaracterizations on the conflicts point.

But, I think, obviously on the competency point, the point is that the same people, the same audit staff that mischaracterized -- failed to detect the mischaracterization of the payment in 2002 are still doing the audit. That obviously raises competency questions, as well.

THE COURT: Okay.

MR. SABELLA: I'd like to spend most of my time on the prejudice point. And I have a number of different points to make there. The obvious one is that while Mr. Dellinger says in his mind, no other audit firm could have gotten up to speed, nobody ever asked the other audit firms if they thought they could.

On the cost point, Mr.

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Dellinger admitted whenever the switch takes place, the new audit firm is going learning curve costs to incur. And whether the switch takes place now or later perhaps compresses the costs into a smaller period of time, but it doesn't change the amount of the costs. So, the transition costs money, but that's going to be incurred whenever they go to the new auditors.

With respect to the money that has in fact been paid out, Mr. Plumb said they're only paid 3.8 million dollars thus far for the 2005 audit. You'll see in the declarations and affidavits, there are numbers like ten million and 15 million, but the fact of the matter is it's only 3.8 million that's been paid thus far for the 2005 audit. So, that's really the only amount of money that would have to be duplicated, it seems to me, if you switched auditors, that would be above and beyond where they are right now.

Now, in terms of the amount of work that has been done on the audit, again, you had Mr. Dellinger's declaration where he's



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kind of made it sound like they'd be in there auditing from the beginning of the year. But, of course, they didn't change the partners until April, so they couldn't have done anything before April or it would have been the old team doing the work, which they say isn't going to be the case. But then Mr. Plumb admitted that before the engagement letter went out on August 29th, there hadn't really been any interim procedures done, only a little bit of work on the quarterly financial statements. And we know they can't really do very much in terms of building off the quarterly financial statements, because they're not audited and there's no review report, and there's no audit report, so the fact of the matter is in the fourth quarter of 2005 and in the first quarter of 2006 is when the audit work takes place. And Mr. Plumb said that. I think he said there's very substantial weighting in the fourth quarter and then the first quarter, in terms of when the audit work has to be done. And Deloitte has slowed down over the past month or so

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because they're concerned that they're not going to get paid.

I think the record is rather clear that if they had switched to another firm on December 6th, that firm could well have completed this audit within the timeframe available and there really is still no competent evidence that one of these other firms couldn't do it. You have some speculation, but I would submit that it's their burden of proof to show that one of the other firms could not get it done and they haven't done that.

I would talk briefly about the independence point. You've heard speculation that each of these firms would have an independence problem, but no real competent evidence that that would be the case, or that an exception couldn't be obtained from the SEC in these unique circumstances, if the Court were to disqualify Deloitte that the SEC would not approve any new firm, even if there was a potential independence problem. But the fact of the matter is just an assertion that these

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firms have done other work for us so we think they have an independence problem seems to me doesn't satisfy their burden of proof. Again, there's no evidence in the record that any of these other firms were asked if they thought they had an insurmountable independence problem for 2005.

It just seems to me, Your Honor, that in a matter of this magnitude, they had an obligation to come forth with some strong evidence with respect to not only the only the prejudice to them in terms of cost, but also the competency in terms of the team. And, I do not cast any aspersions on Mr. Plumb or the new senior members of the team. But you have so many people here who were involved in audits that have now been blown up, where the financial statements have been restated and you have SEC and criminal investigations. It just seems to me you don't want those same people working on the audit, and the evidence is clear that that is exactly what is going to be the case.

MR. TENZER: (inaudible), Your

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2 Honor.

3 MR. SABELLA: May I consult  
4 with my lawyer for a second?

5 Your Honor, Your Honor asked  
6 about what evidence there was in terms of who  
7 initiated or instigated the investigation that  
8 led to all of this, and I am looking at what  
9 Mr. Coffy has handed me, which is a Delphi  
10 press release of March 22, 2005, which states  
11 as previously reported, Delphi's audit  
12 committee instituted an internal investigation  
13 in response to an SEC inquiry regarding the  
14 accounting for certain transactions with  
15 suppliers and information technology services  
16 in 2001. And it goes on from there.

17 If Your Honor would like, I  
18 guess we could mark that as an exhibit to the  
19 proceeding.

20 THE COURT: Is that all it  
21 says about what prompted the inquiry?

22 MR. SABELLA: That appears to  
23 be all it says about what prompted the  
24 inquiry. It goes on to talk about the  
25 inquiry, but that's all it says about what

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2 prompted it.

3 THE COURT: All right.

4 Frankly, I don't think that's particularly  
5 helpful, so I don't know what prompted the SEC  
6 -- clearly, what is alleged here and what was  
7 restated is a lot more than just what is  
8 referred to there. So, I don't know how D and  
9 T cooperated, didn't cooperate, etc., so --  
10 okay.

11 MR. SABELLA: Thank you.

12 THE COURT: Thank you.

13 MR. TENZER: Your Honor, I'll  
14 be brief. First of all, I wanted to say that  
15 I think that Mr. Sabella mischaracterized my  
16 remarks in a very important area, and that is  
17 this. I do not believe that what the  
18 plaintiffs have put on here is grounds for  
19 rendering Deloitte disinterested or having an  
20 interest adverse to the estate. Nobody should  
21 construe from any part of this record that the  
22 debtors don't take seriously what's gone on in  
23 the past. I frankly resent the fact that he  
24 says that well, Mr. Tenzer said this is no big  
25 deal. It's being given the weight that it's

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2 supported nobody should assume otherwise.

3 Second of all, just a couple  
4 of more points. I think the record speaks for  
5 itself and if Your Honor is going to rule rely  
6 on the record, not Mr. Sabella's  
7 characterizations of it. I would note, Your  
8 Honor, that on the cost side, I believe that  
9 what Mr. Plumb testified is that the 3.8  
10 million relates to the work in the U.S. And  
11 that what the cost that he estimated in his  
12 affidavit as to the overall costs of the audit  
13 are the right number. Again, the record  
14 speaks for itself.

15 I would also note that -- my  
16 last point, Your Honor, is -- on the issue of  
17 getting somebody else to do it. Leaving aside  
18 the evidence in the record, which I submit is  
19 overwhelming about how difficult it would be  
20 to get somebody else to do it. The lead  
21 plaintiffs continue to suggest that what the  
22 debtors did was wrong because they know the  
23 accounting rules and they made the  
24 determination that no one else could have been  
25 independent, or there was a serious risk that

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they would have been classified as not independent, and then having made that reasonable determination, didn't go out and crawl under every rock and investigate every possible alternative when, based on their analysis, that alternative could not have come to fruition.

I leave Your Honor with that.  
Thank you very much.

THE COURT: All right. Let me ask. This is just for scheduling matters. I'm assuming, but maybe I'm incorrect, that almost everyone who is here is also here on the next matter. There's no one who would leave if the next matter was decided.

UNCLEAR: Your Honor, the U.S. Trustee would leave, but that's fine.

THE COURT: All right. Well, but the government's paying you, so -- although, I do appreciate the demands that your office is under. I'm going to take a break for lunch and come back and rule and then deal with the discovery issue on the other matter.

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2 MR. SABELLA: What time, Your  
3 Honor?

4 THE COURT: About an hour from  
5 now. Twenty of two.

6 (Court recesses.)

7 THE COURT: All right. We're  
8 back on the record in Delphi. I have in front  
9 of me a motion by the debtors to retain the  
10 accounting firm Deloitte and Touche for  
11 purposes of completing the debtors 2005 audit.  
12 The debtors being a public corporation, that  
13 is obviously a very important function for  
14 them. Subject to reviewing the specific  
15 language in the Order memorializing an  
16 agreement outlined at the beginning of the  
17 hearing, between the debtors, Deloitte and the  
18 official creditors' committee, the application  
19 is unopposed with the exception of an  
20 objection by the lead plaintiffs in  
21 consolidated securities litigation against the  
22 debtors and various other parties, including  
23 in some instances, or some instance, Deloitte  
24 and Touche.

25 I should note that this is



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obviously a very large case with a great number of parties in interest and the debtors have asked me to take cognizance of the fact that there is only one objection to the proposed retention of Deloitte. I have done that, but in doing so, I have not belittled the importance of the objection and the interest of the bankruptcy process, generally, in considering retention applications of professionals.

Section 327a of the Bankruptcy Code provides that the trustee, or in this case the debtor in possession, with the Court's approval may employ one or more attorneys' accountants, et cetera, that do not hold or represent an interest adverse to the estate and that are disinterested persons to represent or assist the debtor in possession in carrying out its duties under the code.

The objection raises two grounds for contending that I should not approve the retention of Deloitte and Touche. The first is that Deloitte and Touche in fact represents an interest adverse to the estate

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and is not disinterested. The second is that Deloitte and Touche's retention is either not necessary or improvident or not in the best interest of the estate, because allegedly Deloitte and Touche is incompetent. The fundamental factual premise for both of these bases for the objection is set forth not only in the class action plaintiffs' objection here, but also in the complaints that they have filed previously before the commencement of this Chapter 11 case.

Essentially, they argue that, in the light of the restatement of the debtors financial statements for 2003, which focuses on primarily problems with the debtors' treatment and recognition of various income and expense items, primarily in years 2000 and 2001. Deloitte has in essence acknowledged, or should be acknowledged, to have improperly conducted its audits of those years and, therefore, is unqualified to serve and moreover, is not disinterested because it would have a conflict in serving to do the audit in 2005, because it would be motivated

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2 to conduct its work in 2005 differently than  
3 it would otherwise conduct that work because  
4 of its concerns about increased liability  
5 relating to the prior years' work that it  
6 performed for the debtors.

7 Let me address the first  
8 aspect of the objection first, which is that  
9 Deloitte holds an interest adverse to the  
10 estate, or is not disinterested.

11 I should note first that the  
12 inquiry under those two clauses is essentially  
13 the same because it is not alleged here that  
14 Deloitte falls within the other categories of  
15 not being disinterested other than its holding  
16 an alleged adverse interest against the  
17 estate. That is under Section 101-14 of the  
18 Bankruptcy Code, Deloitte is not a creditor or  
19 equity security holder or an insider of the  
20 debtors, is not an investment banker for any  
21 outstanding security of the debtors, either  
22 now or within three years before the date of  
23 the filing, nor within the last two years  
24 before the filing, an officer, director or  
25 employee of the debtors or of such an

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investment banker, and has not represented any party with such an interest.

So, my focus is on the alleged adverse interest that Deloitte has, whether it's under the disinterestedness aspect of 327a, or 327a's express reference to adverse interest. And the cases in this circuit and elsewhere have made it clear that those two inquiries are essentially the same, see *In Re Ericham Corporation*, 176 F3d 610 Second Circuit, 1999.

In considering retention applications before delving into or parsing the adverse interest standard, I should note further language from the *Ericham* opinion, in which the second circuit stated quote, by regulating the trustee's ability to hire professionals, Section 327 serves the important policy of ensuring that all professionals appointed to represent the trustee tender undivided loyalty and provide untainted advice and assistance in furtherance of their fiduciary responsibilities. When evaluating a proposed retention, a bankruptcy

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court should exercise its discretionary powers over the approval of professionals in a manner which takes into account the particular facts and circumstances surrounding each case and the proposed retention before making a decision.

The discretion of the bankruptcy court must be exercised in a way that it believes best serves the objectives of the bankruptcy system. Among the ultimate considerations for the bankruptcy courts in making these decisions must be the protection of the interest of the bankruptcy estate and its creditors and the efficient, expeditious and economical resolution of the bankruptcy proceeding. That's it. Page 621 of the Ericham decision.

That decision goes on to note, as cases citing it subsequently have noted, that I should look when considering in particular the adverse interest aspect of qualification to the particular tasks that the professional is being sought to perform. See Ericham at page 622.

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Finally, as both Ericham at 625 and the more recent opinion by Judge Gonzales at 311BR 151 at 165 in In Re WorldCom, Inc., Bankruptcy Seventh District, New York 2004 point out, the Court should be sensitive to the possibility of the strategic abuse of objections to retention or disqualification motions.

In addition, it's clear from the face of the statute, both Section 327a and 101-14, that the Court's focus should be on the existence of any present adverse interest. Again, see Ericham at page 623 and WorldCom at page 169.

In Ericham, the Second Circuit adopted the following general formulation of what is an adverse interest, which, of course, it requires to be applied on a case by case basis in light of the particular facts. It is, in the words of that Court, an interest that causes the professional to possess or assert any economic interest that would tend to lessen the value of the bankruptcy estate, or that would create either an actual or

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potential dispute in which the estate is a rival claimant. Or, two, to possess a predisposition under circumstances that render such a bias against the estate.

As Judge Gonzales noted in the WorldCom case, an interest is not considered adverse simply because it is possible to conceive of a situation where interest might clash. That's at page 168. Rather, one should consider whether it is plausible that another interest may cause the professional to act any differently than they would without that other representation, in which case the professional would have a disabling conflict. It is noted by Judge Brozman in the Leslie Fay decision at 175 BR525 Bankruptcy Seventh District of New York 1994, again, merely a conceivable conflict is not enough to raise a disabling conflict under Section 327a, but the difficulty is in drawing the line between something that is merely conceivable and something that is disabling, because it is clear from the cases that a potential conflict may be significant enough to be disabling. As

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Judge Brozman stated, a potential conflict may cross the line and be disabling if it gives the professional meaningful incentive to act contrary to the best interest of the estate. Or, sufficient to place the estate at more than an acceptable risk that it would be reasonably susceptible to such conduct. And that discussion appears at pages 532 and 533.

When it comes to a disabling conflict, and if one is found, it appears that the Court should not take into account any sort of balancing of that conflict versus the cost to the estate of replacing or hiring a different professional. Again, this is in the adverse interest context, as opposed to the debtors' general judgment to hire a particular professional and the Court's review of that judgment. But, if in fact I were to find that Deloitte and Touche did have a disabling conflict, then I believe that the better view is that I should stop there and not engage in any sort of cost balance test. See *In Re Andover Togs, Inc.*, 2001 U.S. District Lexus 2690 SDNY, March 15, 2001.



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As I stated before, the objectants here argue Deloitte and Touche is likely to act differently than would otherwise be the reasonable expectation of a conduct of a Big Four accounting firm in preparing the 2005 audit because of what happened in prior years in respect of its work for the debtors. Elaborating on that allegation, it is contended that Deloitte and Touche will not be properly diligent in performing due diligence and in supervising and going behind the preparation of the audit and looking at the numbers given to it by the debtors' management. Because it would be inclined to cover up anything that it would find to limit further exposure in connection with its past audits.

We've had an evidentiary hearing that took up the greater part of this morning exploring that concept. And I've reviewed the evidence, including the testimony of Mr. Plumb, the Deloitte and Touche partner in charge of the engagement for 2005, as well as the company's CFO, Mr. Dellinger, who would

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be both participating on the company side from the -- in the audit, as well as had a role in the determination to retain Deloitte and Touche for such audit.

I should note that the debtors have sought to retain a different Big Four accounting firm to perform their audits going forward, that is, for 2006 and going forward - E & Y. When I originally was made aware of this fact, I had some concern that that was an acknowledgment or at least an expression of concern on the debtors' part that they believed that either Deloitte's prior work was sub-standard, or that it had a conflict and that in fact, it was only retaining Deloitte for 2005 because of the cost of replacing Deloitte, although it would not otherwise have been satisfied with Deloitte's work. I am satisfied based upon the testimony that that is not the case. I am further satisfied, that, again, based upon the testimony, Deloitte and Touche, in performing the specific services that the debtors seek to retain it for also does not have a disabling

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conflict. The testimony is that the debtors never considered replacing Deloitte and Touche to conduct the 2005 audit, but rather conducted what's colloquially referred to as a beauty pageant for the year 2006 of all of the four large public accounting firms, including Deloitte and Touche. That determination apparently was not motivated by a concern about any conflict on Deloitte and Touche's part or sub-standard work by Deloitte and Touche performed in the past, or in connection with concerns about the 2005 audit, but rather, a matter of planning for the future including in recognition of the debtors' new status as debtors under Chapter 11 of the Bankruptcy Code. The testimony of Mr. Dellinger was that Deloitte was given exactly the same opportunities to shine in the beauty pageant as the other three accounting firms and that E & Y was chosen for 2006 because of its specific expertise in Chapter 11, reorganizations and its engagement partners' experience with so-called Tier One automotive parts companies, like the debtors, including

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such companies in bankruptcy.

There was further testimony by Mr. Dellinger that he believed that the Deloitte team that interviewed for 2006 was qualified and capable, but simply did not have the specific extra skills or skill set that the E & Y group did. Again, the possibility or concern about a conflict of interest did not enter into the equation.

In addition, there was testimony by Mr. Plumb that D and T has slowed down its work in the U.S. where it is not under, he believes, a statutory obligation to continue work to complete the audit, unlike in Europe. Shortly after having been made aware of the class plaintiffs' objection to D and T's retention, one might, simply from that fact, take away the inference that Deloitte and Touche itself was concerned about a conflict and was rethinking if the merits are bonafide of its continued service. Again, based on Mr. Plumb's testimony, I do not make that inference. It appears to me that the slowdown in the work, which has been

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relatively brief, was based instead upon a concern perhaps reflecting the difference between D and T and E & Y's experience in bankruptcy cases that the Court for some reason would not approve its retention, and therefore, that its fees for the continued work were in jeopardy.

What then is there by way of evidence that D and T is reasonably likely to change its normal and reasonable performance of the audit in the light of the existing lawsuits and the existing allegations in respect of the prior restatements. Essentially, again, it is an inference. There is no suggestion that there has actually been any such change in performance. And while I note, as the class plaintiffs made clear, as well, that the debtor has the burden on this application, it has offered testimony that, in fact, the work done in connection with the 2005 audits has been without the taint of a conflict of interest. And that it has been instead entirely appropriate and conducted in a manner that one would expect of a Big Four

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2 accounting firm.

3 Looking behind the allegation,  
4 however, I have considered whether I should  
5 assume that there would be a conflict in the  
6 work that Deloitte is being asked to do,  
7 because as made clear by the Ericham case, one  
8 should focus on the specific function to be  
9 performed by the professional, and whether the  
10 conflict would arise in the performance of  
11 that specific function.

12 Here, it appears clear to me  
13 that the Deloitte personnel not only  
14 responsible for the audit, but also making all  
15 judgment calls in respect of the audit were  
16 not the specific individuals involved in the  
17 audit work done by Deloitte for the years that  
18 had been restated. And that they frequently  
19 discuss their judgment calls with Mr.  
20 Dellinger, and he with them.

21 That obviously doesn't end the  
22 inquiry, because they are, after all,  
23 employees of Deloitte and have an interest in  
24 Deloitte not facing further risk in connection  
25 with the accounting work for Delphi.

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2 Although, of course, that concern does cut  
3 both ways. Knowing the fact that Deloitte has  
4 already been sued in connection with the prior  
5 restatement, the debtors argue that Deloitte  
6 will be extra careful, particularly in the  
7 fishbowl environment of a bankruptcy case  
8 going forward.

9 However, there is some logic  
10 to the class plaintiffs' suggestion that it's  
11 human nature to try to shield one's self  
12 against further liability for something that  
13 may have gone wrong in the past.

14 However, in exploring that  
15 contention in this particular context, I note  
16 the following: first, the past here is just  
17 that. The work that is complained of by the  
18 class action plaintiffs and that is under  
19 investigation by the SEC and others was in the  
20 past, in primarily 2000 and 2001 in respect of  
21 audits of those years. It seems to me,  
22 therefore, that, Deloitte, having signed off  
23 the restatement of those years and continuing  
24 to work for the debtors through the 2005  
25 audit, will have opportunities to undo or

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cover-up in respect of those prior years. And I note again that that is their only function in this case. They're not serving, for example, as general accountants or restructuring advisors for the debtors with opportunities to use other of their functions to enhance any sort of leverage they might have in respect of potential liability of third parties or the debtors in the accounting matter.

Moreover, in looking at the allegations as detailed in the complaint and, in particular, in paragraphs 2a through e of the class plaintiffs' objection, it appears to me, and there was not much contradiction of this at the hearing that the particular alleged accounting improprieties that Deloitte was allegedly responsible for or had a share in went beyond the types of judgment calls that accounting firms at a relatively senior level make. In other words, it does not appear to me, based on my review of the record, such as it is, that the alleged problem with Deloitte is an inability to



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conduct proper forensic procedures or turning a blind eye to what one would colloquially understand to be a fraud, but rather an allegation or allegations with respect to judgment calls that now would be made by different parties at Deloitte and made those earlier calls.

I also note that Mr. Dellinger who would be overseeing from the company's side the audit, as well as the debtor CEO, were not involved in the years that were restated. Therefore, it appears to me that the conflict that is alleged here falls on the side of the line that is a mere potential conflict, as opposed to a disabling conflict. Or, the type of conflict that the TWI International case, 162 BR672 in the SDNY 1994, referred to as a potential actual conflict. This is rather a potential potential conflict, and, therefore, I do not believe that it disables Deloitte from performing the function that the debtors seek it to perform.

The second basis for the

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objection is that in the light of Deloitte's  
prior work and the deficiencies alleged in the  
class action complaints and in the fact that  
there was a material restatement of the  
financials for prior years, Deloitte is not  
competent to perform the audit function for  
2005. The objectants argue that I should  
scrutinize this issue closely, basically  
employing a best interest type of analysis.  
And I have looked at it carefully, although I  
note that there is a strong policy under the  
Bankruptcy Code of letting the debtor in  
possession have the particular professionals  
that it chooses. That is, the Court may  
review for more than a lack of  
disinterestedness to determine whether the  
professionals' retention is reasonably  
necessary, and in certain circumstances,  
Courts have refused to let a debtor retain a  
particular professional. For example, when  
the Court found that the professional had been  
suspended from state court practice as in the  
In Re Light Ray Realty Corporation case, 2001  
US District Court Lexus 16437, SDNY October

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12, 2001, for it found the professionals' rates egregiously high, as discussed at 3 Kayon Bankruptcy, paragraph 327041, but the Court cannot mandate the appointment of a particular professional, and even as set forth in those authorities that I just cited should generally be deferential to the debtors' particular choice.

I think that's truly relevant here when one considers the size of these debtors and the fact that in all likelihood only a Big Four accounting firm could conduct the 2005 audit. It appears to me that E & Y would not as a matter of the securities laws be permitted to conduct that audit, although the class action plaintiffs that at least the debtors could seek some sort of waiver by the SEC, which means that even if I believe that on competency grounds, Deloitte should be replaced, the debtors would be down to two other accounting firms. And in essence, I would pretty much be specifying who the debtors would be retaining. Again, something that the Courts have long held that the

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bankruptcy court should not do. See In Re  
Mandel, 69 F2d 830 Second Circuit, 1934.

In any event, I conclude,  
again, based upon the testimony that not only  
is Deloitte as a firm fully capable of  
performing the 2005 audit, but that the  
particular audit team, as headed up by Mr.  
Plumb and Mr. Steiner, is qualified as well to  
perform that audit. I do that based upon Mr.  
Plumb's testimony, as well as Mr. Dellinger's  
testimony. The senior partners of D and T  
supervising the audit, and it appears clear to  
me from Mr. Plumb's testimony that supervision  
is very hands on, have extensive experience.  
Mr. Plumb is a very senior D and T partner  
with 35 years of experience and Mr. Steiner,  
again a very senior D and T partner, has 40  
years experience. Moreover, Mr. Dellinger has  
extensive experience on the company side in  
overseeing audits for Fortune 500 companies  
and greater, and he testified without  
reservation that he was quite comfortable with  
the present D and T team.

In addition, if that were not

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enough, it appears clear to me that there are significant costs and risks to the debtor in replacing Deloitte and Touche with another Big Four accounting firm at this time. The monetary cost -- there's a dispute between the parties about how high those would be. They range from the amount that D and T has been paid to date of 3.5 million for U.S. work, plus an unstated amount for foreign work, to roughly a 20 million dollar estimate by Mr. Dellinger, based upon his estimate of the full amount of work that D and T has done to date, which obviously includes work done since the bankruptcy case was filed that D and T has not been paid for, which would have to be redone in large part by a new firm, as well as the extra cost that would be incurred by a replacement accounting firm to have a hope of completing the audit within the time mandated by the securities laws and regulations. And, of course, that timing point is on top of the cost estimate of between 3.5 and 20 million dollars.

Also, very important, the

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failure of the debtors to issue audited  
financials in a timely basis clearly would  
harm the debtors. It would do so in two  
respects. First, it would result in a default  
under the DIP financing agreement, which I  
would expect, if it were because of these  
circumstance, would be waived, but there would  
be clearly some cost in connection with it.

More importantly, these  
debtors have made extraordinary efforts, which  
appear to me to be successful so far, to  
operate their businesses in Chapter 11 in a  
way that retains customer and supplier  
confidence, as well as the confidence of the  
financial community. The inability to provide  
audited financials in a timely basis could  
seriously jeopardize that confidence and undo  
the work and the money that the debtors have  
spent thus far to obtain that confidence.

So, therefore, again, I find  
that this basis for objecting to D and T's  
retention is not sustained and that the  
debtors have carried their burden of showing  
that first, they have exercised proper

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2 judgment in retaining D and T for the 2005  
3 audit. And second, that D and T meets the  
4 standard of disinterestedness and not holding  
5 an adverse interest set forth in Section 327a.

6 So, Mr. Roll, you can submit  
7 an Order to that effect.

8 MR. ROLL: Your Honor, thank  
9 you. On the process of having the Order  
10 entered, before we came to Court today, we  
11 produced a blackline Order which had some of  
12 the changes that we thought we would have to  
13 make to deal with the issues in the  
14 committee's objections. And then, during the  
15 course of the day, we added additional  
16 interlineations to that and the parties have  
17 now agreed on that language.

18 How would you like to proceed  
19 in terms of getting that before Your Honor?

20 THE COURT: Well, you can  
21 submit it -- you can hand that to me now, and  
22 if the language reflects what you set forth on  
23 the record, and I assume it does because the  
24 parties have agreed to it --

25 MR. ROLL: What I would do,

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2 Your Honor, is approach and hand you up my  
3 copy with the interlineations on it. I can  
4 walk you through them --

5 THE COURT: Well, you can e-  
6 mail it, too, if you want.

7 MR. ROLL: We can do that.

8 THE COURT: Let me make sure  
9 that I understand you. Are the changes to the  
10 Order only the ones responding to the  
11 committee objections?

12 MR. ROLL: The answer is that  
13 the only two other additional minor changes,  
14 Your Honor, as we added the language that says  
15 the other objections the extent not dealt  
16 within the Order are overruled.

17 THE COURT: Okay.

18 MR. ROLL: And, I think, and  
19 frankly, in fairness to the Court with  
20 everyone involved, the Order as originally  
21 submitted to Your Honor in paragraph 1 says,  
22 the application is granted on a final basis.  
23 Well, as Your Honor is aware, the application  
24 included the and thereafter language and that  
25 we're not seeking approval for, --



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2 THE COURT: Right.

3 MR. ROLL: -- so that portion  
4 of the application is withdrawn, and we just  
5 add language to that effect.

6 THE COURT: All right. Well,  
7 if you want to -- are the interlineations in  
8 handwriting?

9 MR. ROLL: Yes, they are, Your  
10 Honor.

11 THE COURT: Well, why don't  
12 you submit a revised blackline version to  
13 chambers by e-mail.

14 MR. ROLL: We will do that,  
15 Your Honor.

16 THE COURT: And you should cc  
17 obviously the objectants, including their  
18 committee.

19 MR. ROLL: We will, Your  
20 Honor. Your Honor, those counsel and others  
21 that need not stay, enter a motion to be  
22 excused.

23 THE COURT: You can go. Yes.

24 MR. TENZER: Your Honor, one  
25 comment for the record, and so the record is

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2 accurate, and we may not have clearly  
3 articulated our chief financial officer's name  
4 to the Court during the morning hearing, but  
5 his name is Robert J. Dellinger.

6 THE COURT: Oh, I've been  
7 saying Gallagher throughout, I'm sorry.

8 MR. TENZER: I just thought --  
9 I know that Your Honor --

10 THE COURT: All right, the  
11 record will reflect it's Dellinger. He's not  
12 here, so he can't -- I apologize to him  
13 anyway.

14 MR. TENZER: No, I may have  
15 been us, Your Honor, I just wanted to mention  
16 that on the record, so that the record was  
17 clear.

18 Your Honor, the only other  
19 matter on the agenda for today for this  
20 adjourned hearing is the carryover from the  
21 January 5th hearing of the 37th item on the  
22 agenda, which was lead plaintiffs' objection  
23 to the KECP at docket number 1619, and the  
24 Court also scheduled our related Motion to  
25 Quash at docket number 1799 on today's matter.

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2 I think Mr. Coffy wants to address the Court  
3 first and, -

4 -I'll be happy to cede the Court to  
him.

5 THE COURT: Okay.

6 MR. COFFY: Good afternoon,  
7 Your Honor. Sean Coffy from Bernstein  
8 Litowitz on behalf of the lead plaintiff.  
9 Your Honor, as you know from the filings from  
10 yesterday, we have not resolved the discovery  
11 dispute relating to our objection to the KECP  
12 motion. In our view, there are two issues to  
13 deal with today. One is whether the limits  
14 that the debtors have placed on -- what they  
15 will provide in this connection comports with  
16 Your Honor's guidance from last week. We  
17 respectfully submit it does not. And  
18 secondly, given that the debtors refuse to  
19 rule out putting on a case, as you put it last  
20 week, in opposition to the allegations we have  
21 lodged, what additional discovery is necessary  
22 and we submit that certain additional  
23 discovery is necessary.

24 What have they agreed to do?  
25 They've agreed to provide a declaration

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explaining the process whereby the audit committee, as we now have been told, vetted these people before they would be eligible for the KECP. That is not adequate in our view, Your Honor. We were hopeful that we could review it before today, so we could point out specifically why it was inadequate, so that we would have an opportunity to resolve any issues that might arise, but we were told it's not ready yet because apparently lawyers at Skadden are still drafting it. I think that gets to a fundamental point that I'd like to address, which is this is not how contested matters, serious contested matters should be litigated: having one side draft and polish a declaration that is drawn from a record that only they get to see. The federal rules don't say that in lieu of providing the documents to your adversary, give a declaration. If I may use a recent example, when they wanted to test what we had to say in our objection, they didn't send over a request saying, could you please provide a declaration? They said, please provide all the documents. Now, if I

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2 had come back and said, well, we won't give  
3 you the documents, we'll give you the  
4 declaration, I doubt that they would have  
5 found that acceptable. I think it's  
6 interesting that this morning, notwithstanding  
7 Your Honor's ruling, that we learn that  
8 sometimes declarations have warts on them.  
9 That maybe there are absolute statements such  
10 as no one on the audit team was on the  
11 priority list. Those types of things that may  
12 not turn out to be correct. Now, it's one  
13 thing to say we'll have a chance to cross-  
14 examine that person here, but as anyone who's  
15 taken a deposition knows, cross-examination is  
16 much more effective if you have a document to  
17 base your question on or to confront a witness  
18 with. And they would deny us that.

19 THE COURT: Well, so you're  
20 asking for the documents that underly that  
21 declaration?

22 MR. COFFY: Your Honor, we  
23 are. And I am prepared to get a compromise on  
24 our request there. Unfortunately, I know that  
25 there are some folks who have also objected,

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2 other objectors, who, I believe, are here  
3 today, just to watch. Because, in addition to  
4 being enjoyable, I think they want to see how  
5 this plays out, because I participated in a  
6 meet and confer yesterday and I think it's a  
7 fair characterization to say that there is  
8 some frustration on the part of other  
9 objectors with the forthcomingness of the  
10 debtors on discovery. And, I think the  
11 federal rules, if I could boil it down, come  
12 down to the terms -- the phrase, trust but  
13 verify. We may get this declaration but how  
14 can we test it? How can we test it?

15 Now, it's required that we be  
16 able to do so is even more important here,  
17 Your Honor, because frankly, there are  
18 indications about why Your Honor should be a  
19 little skeptical of assurances that may be  
20 placed in a declaration --

21 THE COURT: Well, what is your  
22 proposal?

23 MR. COFFY: My proposal is as  
24 follows, Your Honor. We would like to know  
25 what the audit committee reviewed when it

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2 reached its decisions.

3 THE COURT: Which decisions?

4 MR. COFFY: Its decision on  
5 who gets to stay and who gets to go.

6 THE COURT: Well, this isn't  
7 about firing or not firing. This is about a  
8 CIRP or a KECP.

9 MR. COFFY: Yes, Your Honor.  
10 Okay, a little bit of background. What they  
11 are telling us now is that the determination  
12 about whether someone would be eligible for  
13 the KECP was made by the audit committee  
14 sometime in the spring of 2005. And that,  
15 although we don't know what the standard is,  
16 it's illegal conduct, that's still undefined,  
17 which is another troubling aspect of this,  
18 that those decisions were made a long time ago  
19 and apparently, had not been revisited  
20 notwithstanding the serious allegations, as  
21 Your Honor characterized and that we lodged in  
22 our complaint, and so what we would like is  
23 what did the audit committee look at, what did  
24 they consider, what documents when they  
25 decided that people should stay and people

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2 should go. And our compromise --

3 THE COURT: But, again, I  
4 don't want to beat the horse, but that's not  
5 what the issue is today, people staying and  
6 people going. It's the issue of whether  
7 someone gets to participate in the KECP.

8 MR. COFFY: Yes, Your Honor,  
9 and more precisely, it's whether the debtors  
10 have exercised reasonable judgment in  
11 determining who is eligible. And, it's our  
12 view that there is already sufficient evidence  
13 for Your Honor to have at least skepticism  
14 about whether reasonable business judgment was  
15 brought to bear here. And we should be  
16 entitled to develop that. And what they are  
17 telling us is that there was a process and  
18 we'll give you a declaration that says here  
19 was the process. But we view the process was  
20 flawed.

21 THE COURT: Well, so, I'm  
22 going to ask this again. You want to see the  
23 documents that underlay the process, right?

24 MR. COFFY: And we're willing  
25 to limit it to the following. We have



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identified 15 specific employees of the company that we believe were either participating in or tolerated or knew of their fraud. And we could limit it to what the committee was shown on those 15 people, plus the people that were separated. That's the only way that --

THE COURT: But, I'm sensing a disconnect here. Just projecting ahead to the hearing. The debtors are going to submit this declaration and they will have put the witness up for an examination beforehand, and you're going to be able to cross-examine the witness on the veracity of the declaration, correct? As to how they went about making the decisions in connection with the KECP. I see some merit to your being able to take discovery as to any documents reflecting what they considered as reflected in that declaration in deciding on the KECP. But that's different than saying that anything the debtors ever considered about any of the employees covered by the KECP should be provided.

MR. COFFY: Well, that's why -

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2 - I take your point --

3 THE COURT: Or, even the 15.

4 MR. COFFY: Well, the 15. But  
5 there are specific allegations which are  
6 derived from among other things, interviews  
7 with confidential sources, not one or two, but  
8 ten of them who are former -- many of them who  
9 are former senior people who, as described in  
10 our complaint, describe a pervasive account  
11 culture of manipulating inventory, sales, etc.  
12 Serious allegations. And, we should be  
13 entitled -- Your Honor has to say, I feel  
14 comfortable that this plan has properly  
15 separated the wheat from the chaff, the good  
16 from the bad. On the present record, you  
17 can't do that. And, we want to be able to  
18 show through discovery, through documents,  
19 underlying documents, that there are issues  
20 here, that there are problems here. And, even  
21 -- Your Honor, just watching what happened  
22 today, at one point, the debtors implicitly  
23 criticized lead plaintiffs' counsel for using  
24 a document insisting that he show him the  
25 entire document. There is such irony in that.

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We asked for that document, and they said no, you can't have it, and they persuaded you to keep it from us. Is that what's going to happen on the 27th? Are they going to say, Judge, we've put forth someone who says the process was fine, and they produced no evidence to undermine your competence in that process. We should be entitled to discover raw materials that show whether in fact the process that they didn't say one word to you about -- let me just --

They gave you a KECP motion that purported to lay out all the key terms. Now, a KECP motion also purported to lay out the recent history, recent events leading to the bankruptcy. Now, as you think about whether you should be comfortable with the declaration that comes from the debtors on this issue, think back that it didn't mention in those events a billion dollar plus restatement, criminal and regulatory investigations and the fact that senior management -- many members of senior management had been fired. And they also

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2 didn't mention, as they had in their chart  
3 attached --

4 THE COURT: Now, we're just  
5 going over what we talked about the other day.  
6 I want to get back to what I -- I didn't spend  
7 all that time the other day just to, you know,  
8 do it all over again. I want to be really  
9 clear about this. I'm going to read you from  
10 a case, and I want you to think -- all of you  
11 -- to think about what is in front of me --  
12 what is it, the 28th?

13 MR. COFFY: 27th, Your Honor.

14 THE COURT: All right. It's  
15 the Ryan Pitchers case, 4 F3d 1095, Second  
16 Circuit, 1993. When the Court discussed the  
17 nature of a proceeding -- in that case, it was  
18 a proceeding under Section 365; this is a  
19 proceeding under 363b. It's basically the  
20 same type of proceeding.

21 The Court made it very clear  
22 that it's a summary proceeding. At heart, a  
23 motion to assume should be considered a sum re  
24 proceeding, intended to efficiently review the  
25 trustee's or debtors' decision to adhere to or

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reject a particular contract in the course of the swift administration of the bankruptcy estate. It is not the time or place for prolonged discovery or a lengthy trial with disputed issues. In reviewing a trustee's or debtor-in-possession's decision to assuming his executory contract then a bankruptcy court sits as an overseer of the wisdom with which the bankruptcy estate's property is being managed by the trustee or debtor in possession, and not as it does in other circumstances, as the arbiter of disputes between creditors and the estate.

Finally, it is important to keep in mind that the bankruptcy court's business judgment is what counts in reviewing the debtors' business judgment.

So, I don't want to get into, and I made this clear at the last time, I'm not going to have a trial of your case on the merits in front of me. What I'm investigating is the business judgment of the debtor in making this decision to give these individuals participation in a KECP. And I agree with

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2 you, based on what they put in their pleading,  
3 I couldn't do that. But, I'm not going to  
4 turn it into a trial of a securities action.  
5 And so, what I want to look at is what  
6 underlies their decision. They're giving you  
7 a description of how they came to that  
8 decision. You have a right to ask them about  
9 how they came to it. And I believe you have a  
10 right to ask them for documents that they  
11 considered, that they considered, in coming to  
12 that decision. Not that you think they should  
13 have considered. But that they considered.

14 MR. COFFY: Your Honor, if I  
15 may -- on that point, we want what you just  
16 said, not what they should have considered.

17 THE COURT: Okay.

18 MR. COFFY: Now --

19 THE COURT: But, I think  
20 that's the only point. I don't what else it  
21 is that you want. But, I'm not sure there's  
22 anything else you're entitled to.

23 MR. COFFY: Well, I think what  
24 we would like to do -- well, Your Honor, the  
25 piece that we want, the piece I believe

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2 you've just authorized us to get, is what  
3 documents they considered with regard to when  
4 they made these decisions. And we accept  
5 that. We do believe that if the process was  
6 flawed, as we believe it to be given who was  
7 still at the company, who was entitled to a  
8 KECP, despite what evidence we have developed  
9 --

10 THE COURT: All right. Well,  
11 you can tell me that. You're fairly free to  
12 tell me that.

13 MR. COFFY: We will. Part of  
14 what we want to do with that is not a whole  
15 15, but four of those people we would like to  
16 depose beforehand. Because it goes to the  
17 integrity of the process, particularly, of  
18 when you have a presentation that never  
19 mentioned to you they had done this vetting.  
20 We want to test what they say. And I  
21 understand Your Honor's concern about not  
22 turning this into a trial. Far too much of  
23 what they've been saying about is decide based  
24 upon who are, instead of what we say. And, I  
25 think if Your Honor wants to approve a KECP,

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2 you want to feel comfortable, you want to feel  
3 comfortable that it's not -- they're not just  
4 putting in place -- they've screened out the  
5 criminals, those with criminal conduct, but  
6 what about people who knew about the fraud --

7 THE COURT: Well, in the  
8 debtors' letter it was careful to say this.  
9 It was the debtors saying that they're not  
10 crooks. I didn't say that's what you're  
11 limited to. But, again it's going to the  
12 business decision here, and as the Ryan case  
13 says, I'm not allowed to decided whether that  
14 decision was absolutely right and, therefore,  
15 bring forward to today all issues related to  
16 it. I have to decide whether it's right in  
17 the context of the position we're in. So,  
18 again, I don't want this to become a major  
19 litigation.

20 MR. COFFY: Your Honor, we  
21 heard you loud and clear on that last week.  
22 Loud and clear. And we believed we reduced  
23 what we wanted to do. We did receive one  
24 document which suggests that in the course of  
25 making this decision, evidence was gathered



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2 and given to an adversary to -- in a contested  
3 hearing to the employers' lawyers. And that's  
4 the type of evidence --

5 THE COURT: I'm sorry. To the  
6 employers' lawyers?

7 MR. COFFY: Well, my  
8 understanding -- and I don't want to say, and  
9 counsel will stop me if I say too much from  
10 this document which is stamped confidential,  
11 that apparently there was a procedure in which  
12 evidence was gathered concerning the alleged  
13 misconduct of employees and then there was  
14 some contested hearing apparently for the  
15 audit committee. And so, these documents  
16 exist, they're apparently gathered and readily  
17 accessible and have been shared with folks who  
18 were in an adversarial posture, so we see no  
19 reason why those can't be given to us. I  
20 think that we should -- we want to test it.  
21 We're not asking for full-blown discovery.  
22 We're happy to live with a three-hour  
23 deposition limit that they've imposed. We  
24 believe we should get at a minimum the four  
25 people we have requested. And, Your Honor,

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they haven't answered the question. In my mind, you did it several times, identified a triggering event. Do they intend to put on a case in opposition to us? And they won't answer that question. And if they do, we're entitled to this discovery.

When you ruled on Deloitte, Your Honor, we have a different view of the serious nature of what occurred at Delphi. And, respectfully, so does the U.S. attorney apparently, and the SEC. Though, we weren't allowed to probe what happened there. And we respect Your Honor's ruling on that. Lets -

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lets -- I would not want to have a ruling -- it would be unfortunate to have a ruling that says that we have failed to sustain our burden when we have asserted what Your Honor --

THE COURT: Well, you don't have the burden. The debtors have the burden.

MR. COFFY: I understand that, Your Honor. But, we have, as you noted, raised serious --

THE COURT: Well, actually, I should press the debtors on this. If the

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2 plaintiffs' counsel introduced their own  
3 evidence as to misconduct by one or more  
4 participants in the KECP, do the debtors  
5 intend to contest it?

6 MR. TENZER: Your Honor, to  
7 that question is we don't intend to put in a  
8 rebuttal case. We intend to have the ability  
9 to argue whether that is relevant and then to  
10 argue -- to cross-examine their witnesses and  
11 so forth. There are a series of misstatements  
12 Mr. COFFY has made, and at some point I'd like  
13 to be able to --

14 THE COURT: All right. No, I  
15 just wanted to know the answer to that one  
16 question for now.

17 MR. BUTLER: That answer needs  
18 to be in the context of something that I need  
19 to say to the Court, because I think there's a  
20 fundamental disconnect before you between what  
21 the Court just said and what Mr. COFFY is  
22 interpreting what you said.

23 THE COURT: Okay. What's  
24 that?

25 MR. BUTLER: Your Honor, Mr.

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COFFY got up here and told the Court that the audit committee vetted people who would get the KECP and who wouldn't get the KECP. The debtors have never said that; that is not a truthful statement. All right? The audit committee conducted an investigation and made determinations about whether people should be separated from the company. All right? It had nothing to do with a KECP. We weren't in Chapter 11, there wasn't a KECP, it had nothing to do with a KECP. Your Honor said that we should provide information regarding the process that went in place in terms of determining how the process for the KECP, and we've offered to give Mr. COFFY not only testimony about how the KECP was designed and the process associated with that and the documents underlying that. We have also said we're prepared to give him discovery on the process that the audit committee used. But the audit committee had no relationship to the KECP. None whatsoever. And what's happening here is the lead plaintiffs, once again, are on a fishing expedition on historical events

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designed to solicit admissions against  
interest by the debtor to bolster their  
securities litigation.

Let me give you a good  
example. They really want to understand what  
standards the audit committee used in how they  
separated people. And they're trying to,  
through their discovery and the comments they  
have made, they're trying to get us to say  
that, gee, people who were separated were  
separated for the following reasons. Because  
they want us to say, Aha, people who were  
separated were separated because they  
committed crimes, or because they violated  
their fiduciary duty. Because they want to  
take that admission and run to the securities  
thing and amend their complaint and say that's  
what we admitted in this case.

For the purpose of this KECP  
hearing only, why people left this company,  
and under what circumstances they left this  
company, is entirely irrelevant to the KECP  
hearing. Yet, they want extensive discovery  
on that. You heard Mr. COFFY just on this

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record a few minutes ago say, we want to have the documents for the 15 people who left, or whatever the number of people were that left. All right? And that is entirely unrelated to the KECP.

Similarly, we do not believe, assuming that we fulfill what we were already working on with the committee and what Your Honor talked about last week, which is that we demonstrate at the hearing on the 27th that we have agreed in our final arrangement with the committee that there is a series of prophylactic mechanisms designed to teck the estate in case new information comes up, something new happens that we understand, that, in fact, there have been wrong filacters that were still at the company, what protection we have about how those KECP awards go. Do we cross and back or are there circumstances in which we escrow matters? We intend to have a protocol with the committee. We are engaged in discussions with the committee on that subject. And I thought Your Honor said last week, so long as you were

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persuaded that we exercised reasonable business judgment in establishing those mechanisms to protect the estate, that you were not going to turn the 27th into a sensationalistic mini-trial, and have Mr. COFFY, as a matter of relevance, be able to take up his individual concerns about any particular individual. That we're not going to call -- that it's not relevant for the hearing on the KECP, and whether we exercise reasonable business judgment, for Mr. COFFY to try to hold a mini-trial on whether he thinks Mr. Smith is a good person or a bad person. And we don't intend to present in our burden or proof, in our evidence -- we don't intend to present anything about any particular individual. And, in Mr. COFFY tries to attack an individual in open court on the 27th, we will urge Your Honor to say that's not relevant to your determination, and if Your Honor decides to let Mr. COFFY put some competent evidence in or what he claims to be competent evidence, that we would reserve the right to cross-examine and to

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2 argue that it's not relevant. But we are not  
3 going to contribute to that by bringing our  
4 own evidence in that respect, Your Honor.

5 THE COURT: Okay.

6 MR. COFFY: Of course, Mr.

7 Butler has the advantage of seeing drafts of  
8 the declaration, which I have not seen. But  
9 what I think I heard was there was no  
10 screening of anyone in connection with the  
11 KECP. There was no process specifically for  
12 the KECP to ensure that people who are not  
13 deserving based on past misconduct would be  
14 unjustly rewarded. But rather that they  
15 relied on work that had been done months  
16 earlier by the audit committee --

17 THE COURT: I didn't hear him  
18 say that at all. But you're going to have a  
19 chance to cross-examine the person on that  
20 point.

21 MR. COFFY: But, Your Honor,  
22 with regard to the point about whether they're  
23 going to put a case on, we're entitled to show  
24 that the KECP is not the result of sound  
25 business judgment, based, among other things,



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that they failed to screen out people who committed misconduct in the past. This is not a fishing expedition. This is not pie in the sky. This is based on articulated facts. As part of that, we intend to put on a case that shows that whatever process they used, whenever they used it, it was fatally defective in that it did not weed out the former head of accounting, the former head of financial reporting, people about whom we have had witnesses say --

THE COURT: All right. But, again, I'm not going to turn this into a trial about each of those people and their liabilities, and, frankly, that's what I sense you're looking for here. Ultimately, it's their burden. I have to consider what analysis they went through in making their decision. You have a right to examine their witness on that analysis. If the analysis was shallow, or nonexistent, then I won't grant the motion. You, I don't think, are entitled to get additional information than what you already have, which, frankly, you're saying

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2 with some logic, a company should have  
3 considered.

4 MR. COFFY: Your Honor, I just  
5 want to -- my understanding of what you said  
6 earlier is that we've been entitled -- in  
7 order to cross-examine that person logically  
8 and pursuant to what I heard you say earlier,  
9 we would be entitled to know the documents  
10 they considered. I understand that we are  
11 getting those, correct?

12 THE COURT: Yes.

13 MR. COFFY: Yes. So, if we  
14 have those documents --

15 THE COURT: If there are any.  
16 I don't know whether they considered them.

17 MR. BUTLER: Your Honor, Mr.  
18 Coffy is going to use that ruling to say that  
19 he ought to get Mr. Sheehan Spot.

20 THE COURT: No, 'cause that  
21 wasn't what was looked at.

22 MR. COFFY: Unless it was  
23 looked at.

24 THE COURT: Well, sure. If it  
25 was looked at --

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2 MR. BUTLER: By whom? By the  
3 people who designed the KECP? Or by the audit  
4 committee --

5 THE COURT: No, the people who  
6 designed the KECP.

7 MR. BUTLER: And Mr. Coffy  
8 believes that the role of inquiries is what  
9 the audit committee looked at.

10 THE COURT: Well, but that's -  
11 - I've already talked -- I've already said  
12 that's not the relevant inquiry.

13 MR. COFFY: Well, Your Honor,  
14 if I may, when we had our meet and confer,  
15 they said there was a process, they assured  
16 you there were no wrongdoers left. And there  
17 is some confusion here only because I have  
18 very imperfect knowledge and have been  
19 learning about bit by grudging bit. And what  
20 we were told in the meet and confer yesterday  
21 was that while there was no screening, and  
22 based on what I have heard now, while there  
23 was no screening KECP-related, the screening  
24 was done by the audit committee earlier. And,  
25 therefore, your allegation that there was no

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screening is false, because look, the audit committee did it. Well, then we should get what the audit committee relied on, because if the process in screening for the KECP was bootstrapping what the audit committee did, there's no distinction. If Your Honor was willing to give us what documents they considered for the KECP and all they did was adopt by incorporation prior findings of the audit committee, those are the documents we should get for the very same logical reason Your Honor said we should get it for the KECP. The confusion, Your Honor, --

THE COURT: Well, let me hear Mr. -- I mean, did the KECP group consider the audit committee's review?

MR. BUTLER: No, Your Honor, they did not. The KECP committee -- there isn't a KECP committee -- the company when it designed the KECP designed the KECP for KECP eligible employees, which included a group of executives here in the United States and group of executives abroad. All right? The HR group did not a time that Mr. Butler,

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2 no relation to me, Kevin Butler, the head of  
3 HR -- this part of the HR department -- is  
4 going to be made available for testimony both  
5 about the KECP -- and we agreed to go one step  
6 farther with them, Your Honor, in the meet and  
7 confer report that we filed. We agreed to  
8 permit Mr. Butler to testify generally about  
9 the audit committee process. All right? And  
10 we provided already a document to Mr. Coffy  
11 with respect to the audit committee procedures  
12 that were used, even though we thought it had  
13 no relationship to the KECP, we tried to  
14 provide that additional information.

15 What we have refused to do is  
16 to take the bait that Mr. Coffy says what we  
17 need to do is to turn over all the files of  
18 all the executives who departed and all the  
19 files of all the executives who are still  
20 here, so Mr. Coffy can get access to that  
21 discovery which he wants not for the KECP, but  
22 for the securities litigation.

23 THE COURT: Well, if --

24 MR. COFFY: May I please be

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1 responsive --

2 THE COURT: -- if Butler, not  
3 you, the other Butler, says well, in response  
4 to a question by Mr. Coffy, aren't you  
5 concerned that Ms. Y was involved in the  
6 following bad acts, if he responds to that by  
7 saying I'm not concerned at all because Ms. Y  
8 was exonerated by the audit committee and  
9 that's why she's on the list, then I  
10 understand Mr. Coffy's point. But, I don't  
11 know if that's his approach. I don't if  
12 that's your namesake's approach.

13 MR. BUTLER: Clearly, the  
14 company's approach is that the people who are  
15 at the company, who are executives of the  
16 company today are in the company's view, KECP-  
17 eligible.

18 THE COURT: Okay.

19 MR. BUTLER: All right. In  
20 the ordinary course of its business. The  
21 company also believes, and had been discussing  
22 separately with the creditors' committee, long  
23 before the court hearing last week,  
24 prophylactic measures dealing with how to

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1 address the issue of if somebody becomes a  
2 target for investigation. For some reason,  
3 someone, you know, expected to happen gets a  
4 Wells Notes. Some event occurs. All right?  
5 How does that effect distributions that we  
6 made to that individual? What happens if  
7 somebody -- because we're not suggesting that  
8 all of us in this room have perfect knowledge.  
9 Mr. COFFY's not the only one without perfect  
10 knowledge.

11 MR. COFFY: Mine's a lot less  
12 than yours.

13 MR. BUTLER: We don't know,  
14 all have perfect knowledge of what's going to  
15 happen during the pendency of these Chapter 11  
16 cases. But we believed, and the committee  
17 believed, and we know Your Honor believed,  
18 that there ought to be included in the KECP  
19 prophylactic protections to protect the estate  
20 in the event that there is some subsequent  
21 determination with respect to wrongdoing. And  
22 the company and committee are committed to  
23 work out those details between the two co-  
24 fiduciaries and present them to the Court as

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1 an exercise of the debtors' business judgment.

2 And we don't think Mr. Coffy gets to decide  
3 whether or not we met what the standard ought  
4 to be. Or, whether Mr. Coffy likes it or  
5 doesn't like it, if it's proper -

- if it's in  
6 the range of relevant exercise of our business  
7 judgment, and we would hope to be able to  
8 persuade Your Honor that if we have a deal  
9 with our co-fiduciary and they think it's  
10 makes sense, we would hope to be able to  
11 persuade the Court that it does make sense.

12 And, if in fact, there is  
13 prophylactic protections in the KECP that this  
14 issue of what Mr. Coffy wants to do is saying,  
15 let's go litigate, right now; let's have a  
16 min-trial on whether Mr. Smith is a good guy  
17 or a bad guy, even though you didn't -- you  
18 know, he's still at the company. We don't  
19 believe in the context of a Ryan and in the  
20 context of a normal KECP hearing, that is  
21 relevant to a KECP hearing. And we will argue  
22 then as we're arguing now that it's not.  
23 Neither should there be discovery on that  
24 point, nor should that be permitted at the

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1 summary hearing on whether we've exercised  
2 reasonable business judgment in the context of  
3 setting up what, by the way, 'cause what is  
4 left, Your Honor, for the 27th is a very  
5 simple matter. All it is now, in our view, is  
6 an ordinary course incentive program. That  
7 has been part of this company's normal  
8 structure since it's existence.

9                   So, we don't see this as --  
10 you know, it was different when we had up to  
11 the 27th the emergence payments and the equity  
12 payments and a whole series of other things of  
13 which we've agreed for the committee to put  
14 off until the second half of the year. It's a  
15 whole different set of discoveries and  
16 different considerations. This is an ordinary  
17 course incentive program, and what Mr. Coffy  
18 wants to do is use it as a sword to get at  
19 those files that the audit committee has on  
20 individuals. And, why? Because he wants it  
21 for the litigation.

22                   And just, on one other point,  
23 Your Honor, in connection with that, is Your  
24 Honor raised the question about whether what

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1 the debtors in reviewing any Rule 11 issues  
2 with respect to the pleading file by the  
3 plaintiffs in this case. And the fact is,  
4 Your Honor correctly surmised that the limited  
5 document discovery that we served on the  
6 debtors, or rather on the lead plaintiffs, and  
7 some interrogatories which they had not  
8 answered, at least as of a day or two ago,  
9 were designed to elicit whether or not they  
10 met their Rule 11 or, in this case, Rule 90-11  
11 obligations.

12 I will tell the Court that  
13 that matter is actively under review. We  
14 think there are serious questions about that  
15 issue, and we believe that matter may well  
16 come before this Court. Because the document  
17 production that they provided to us, other  
18 than three debtor documents, was a compilation  
19 of clipping services from documents filed by  
20 us with the Securities and Exchange Commission  
21 and various newspaper reports, including  
22 reports on which Mr. Coffy is quoted as to  
23 what he thinks the problems are with the  
24 company. We're going to review that

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1 carefully, as Your Honor would expect, and  
2 we'll be in communication with the lead  
3 plaintiffs and we think with the Court on that  
4 subject.

5 MR. COFFY: Your Honor, if I  
6 may just jump on that last point. I don't  
7 think it's any coincidence that having had our  
8 documents for weeks, that it wasn't 'til after  
9 Your Honor surmised last week that we had past  
10 Rule 11 muster.

11 THE COURT: I didn't say that.

12 MR. COFFY: But, no, you  
13 assumed that that's why they did it. That now  
14 they're stirred to make that Hail Mary pass.  
15 Your Honor --

16 THE COURT: Well, let me say  
17 for the record. Like every judge, I don't  
18 welcome any sort of Rule 11 litigation. It's  
19 generally a sideshow.

20 MR. COFFY: I think the word  
21 is transparent, Your Honor --

22 THE COURT: People have to  
23 think very long and hard before they make a  
24 Rule 11 allegation. So, but --

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1 MR. COFFY: Your Honor, they  
2 do want it both ways. They say, no problem,  
3 Your Honor, these people are all high. We  
4 say, well, we want to protest that. Then they  
5 say, well, no, no, that was done in some other  
6 context. They told us yesterday that the  
7 reason their comfortable that no crooks are  
8 getting -- is because of what the audit  
9 committee did. Now, they're running from  
10 that. That is precisely what we understand  
11 the process was, and those are the documents  
12 we should get. And, if we could have these  
13 very abbreviated depositions of four -- I'll  
14 reduce it to two, so that we can say, Your  
15 Honor, whatever they're telling you, whatever  
16 assurances they're giving you now --

17 THE COURT: Well, what is it  
18 that you want -- what will be the subject  
19 matter of those depositions?

20 MR. COFFY: The head of  
21 financial reporting. We have spoken with a  
22 witness who informs us that the books for 2000  
23 were reopened in order to re-characterize a  
24 loan from Bank One of 200 million dollars as

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1 revenue and cash flow. Your Honor, with due  
2 respect to what you said earlier, that's not a  
3 foot fault, that's not a touch foul, that's  
4 not a grey area of judgment. That's black and  
5 white. That's not what you do. So, we want  
6 to enquire about her. She's still with the  
7 company, apparently still involved in  
8 financial reporting. Shouldn't the estate be  
9 concerned about that? Shouldn't Your Honor be  
10 concerned? What did the company do? Here's a  
11 question: what did they do since they got our  
12 complaint in September? Now, I've received  
13 calls. People have read our complaint. I've  
14 received calls from the SEC and others, saying  
15 these are serious. Can you help us  
16 investigate? More than that I will not say.  
17 I've gotten calls from reporters, apparently -  
18 -

19 THE COURT: But let's stay on  
20 track. That's an argument you can make at the  
21 hearing. I don't understand why you need  
22 discovery for that?

23 MR. COFFY: I understand, but  
24 in order to back up, we would like Laura

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1 Marion to say were you asked about these  
2 things, and if we can demonstrate to Your  
3 Honor that notwithstanding her involvement in  
4 a 200 million dollar gimmick, they -- she has  
5 passed muster for the KECP. Wouldn't that  
6 give you pause about whether the KECP is sound  
7 exercise of business judgment?

8 THE COURT: Well, not if she  
9 has to give it back or it's put into escrow.

10 MR. COFFY: Well, Your Honor,  
11 that, to me, is a ban -- first of all, it  
12 appears that our objection at least has had  
13 the benefit of spurring --

14 THE COURT: No, no, please.  
15 You know, don't take credit for everything.  
16 All right?

17 MR. COFFY: I'm not -- Your  
18 Honor --

19 THE COURT: Good gracious.  
20 You have to give me some credit that I've seen  
21 through a number of KECPs before and they  
22 generally have these types of provisions.

23 MR. COFFY: Very well, Your  
24 Honor. I withdraw that remark. I apologize.

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1 Your Honor, and I contest that I forgot the  
2 point we were talking about right before that,  
3 but --

4 THE COURT: You said it was  
5 just a bandaid, that it would be put in escrow  
6 --

7 MR. COFFY: It's a bandaid  
8 because --

9 THE COURT: Because why?

10 MR. COFFY: They --

11 THE COURT: If it's put into  
12 escrow, how is the estate harmed?

13 MR. COFFY: If the estate is  
14 harmed because it's a process that is infected  
15 with errors, and to say that it --

16 THE COURT: It's money. It's  
17 in escrow. How is it harmed? How is the  
18 estate harmed?

19 MR. COFFY: We don't know  
20 that. We don't know any of the details.

21 THE COURT: Well, I understand  
22 that. Why should we have a whole discovery  
23 festival until we know those details? So, why  
24 shouldn't I have the limited discovery that

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1 the debtors propose in addition to your right  
2 to get the documents that the people who were  
3 putting together the KECP considered, and  
4 then, if there isn't an appropriate set of  
5 safeguards, then I'll adjourn the hearing and  
6 let you take discovery.

7 MR. COFFY: Your Honor, we can  
8 live with that. But I request on one piece of  
9 that. We know, its -- representations have  
10 been made that the people who decided who put  
11 together the KECP relied on what the audit  
12 committee did. This is all about who's getting  
13 money and who should be screened out.

14 THE COURT: You know what? If  
15 it's put in escrow, it doesn't matter.

16 MR. COFFY: It does matter,  
17 Your Honor.

18 THE COURT: Why? Why?  
19 Shouldn't your remedy be a move for a trustee  
20 then? If that's what you really think, that  
21 it's not a matter of money, but it's the  
22 individual people at the company? 'Cause if  
23 it's just money and you put it into escrow, I  
24 don't see any harm.

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1 MR. COFFY: Well, Your Honor,  
2 again, the devil is in the details. We  
3 haven't seen it.

4 THE COURT: All right.

5 MR. COFFY: But the idea that  
6 based on what I understand to be the standard,  
7 that you would give bonuses to people who knew  
8 about serious accounting shenanigans. You  
9 would give it to them and then hope to get it  
10 back at some point. Or, hope to adjudicate  
11 down the road later what happened is cart  
12 before the horse. And so, Your Honor, we have  
13 tried -- we believe we have complied with Your  
14 Honor's direction from last week. To me, if  
15 the only disconnect in how Your Honor proposes  
16 we proceed is that you're saying we're  
17 entitled to probe how people were screened for  
18 the KECP, or not, but not the audit committee,  
19 which is where that screening took place.  
20 And, respectfully, that doesn't --

21 THE COURT: If that's what  
22 comes out at the hearing, you may win. All  
23 right?

24 MR. COFFY: Or, at the  
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1 deposition of Mr. Butler.

2 MR. BUTLER: Your Honor, may I

3 --

4 THE COURT: Fine. But -- or,  
5 I may adjourn it, because I'm not satisfied  
6 with the protective measures. But in  
7 balancing in what should be done now, I don't  
8 see why the debtors should be put through this  
9 extra layer. I really don't. There are other  
10 opportunities for that, if you want to put it  
11 that way, in the district court, in your  
12 securities litigation or in this court, in  
13 appropriate litigation. But not in connection  
14 with this. And it may be that -- I don't know  
15 when you're going to be submitting this agreed  
16 protocol, but it may well be that the hearing  
17 gets adjourned. It may happen. But, I don't  
18 think it's fair to have discovery in essence  
19 over matters relating to the KECP only at this  
20 second remove, particularly given the nature  
21 of that discovery, based on what I know now is  
22 going to happen at the hearing.

23 MR. COFFY: Well, Your Honor  
24 if I may just address the point. A one point-

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1 point. Again, there's a lot being said about  
2 who we are instead of what we said. As I  
3 understand it, we currently represent a class  
4 with one of the largest claims --

5 THE COURT: No, that's not --  
6 you misunderstood me. You misunderstood me in  
7 this respect. The hearing, as I began this  
8 hearing with, the hearing on the KECP is not a  
9 hearing on who has criminal or civil  
10 liability, or really, even who is bad and who  
11 is good. It's on the debtors' business  
12 decision to enter into a KECP. Now, at some  
13 level, that has to take into account the  
14 debtors' review of whether they're awarding  
15 the KECP properly and, as important, whether  
16 there are measures in place to make sure that  
17 they don't pay money out that is not protected  
18 in some way, but turns out later that they  
19 were mistaken about someone. But it's not  
20 that type of hearing. It's not a hearing  
21 where someone in particular is on trial.

22 MR. COFFY: I understand that  
23 in the normal course -- I understand that,  
24 Your Honor.

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1 THE COURT: Not in the normal  
2 course -- in any course.

3 MR. COFFY: Well, but, Your  
4 Honor, you acknowledged last week that what we  
5 have raised are serious allegations. The  
6 process, whatever it is, spit out a result  
7 that says these people get money.

8 THE COURT: You can still make  
9 the allegation.

10 MR. COFFY: But we should be  
11 entitled to some limited discovery on that. A  
12 deposition of these people and the files that  
13 Your Honor --

14 THE COURT: No, I don't  
15 believe so. I don't believe so. At least not  
16 based on what I anticipate is going to be in  
17 front of me, which is a motion that has  
18 safeguards in it that this money not be paid  
19 out improvidently.

20 MR. COFFY: Well, Your Honor,  
21 what I'm hearing then is that there are two  
22 pieces to this, and I'm respectfully by  
23 focusing on the prophylactic piece and not on  
24 the going-in piece, I believe that is ill-

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1 advised.

2 THE COURT: All right. Well,  
3 if the prophylactic piece in my determination  
4 turns out to be insufficient, then you can  
5 take later discovery and I'll adjourn the  
6 hearing.

7 MR. COFFY: Well, Your Honor,  
8 it's the first part about a process that will  
9 apparently put money in the pocket of --

10 THE COURT: You don't know  
11 what it's going to say, yet. I don't either.  
12 You don't know what the safeguards are.

13 MR. COFFY: All right. Well,  
14 then I'd like to -- I'll defer to Mr. Butler  
15 to see what possibly more he could have to say  
16 that he hasn't already said during my  
17 argument, and then --

18 THE COURT: Well, I don't know  
19 what more there is to say. You are entitled  
20 to the documents to help you depose the  
21 witness that they're going to have on the  
22 KECP, so therefore, the documents that those  
23 people, the personnel people -- whoever it was  
24 that put together the KECP considered in

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1 putting together the KECP. I think it's  
2 relevant if they just decided that they  
3 weren't going to consider whether someone was  
4 involved in an investigation or not. But, I'm  
5 not going to let you get into the  
6 investigation. Unless it was an investigation  
7 they did in connection with the KECP.

8 MR. COFFY: Either directly or  
9 according to my information, --

10 THE COURT: No, no, no. We've  
11 been through that.

12 MR. COFFY: Okay. Well, Your  
13 Honor, --

14 THE COURT: And, if in fact,  
15 the protective measures that are being  
16 negotiated with the committee in my mind are  
17 not adequately protective, then we'll probably  
18 adjourn the hearing, and we'll decide whether  
19 there will be more discovery or not.

20 MR. COFFY: Your Honor, when  
21 we get this declaration and when we depose Mr.  
22 Butler, we certainly reserve the right if he  
23 says, we did no screening other than what had  
24 been done by the audit committee, we would

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1 again ask that we be given the limited number  
2 of records that we believe are gathered for  
3 the 15 who are still at the company and those  
4 who left. So, that we can do this efficiently  
5 on the 27th and Your Honor can with a full and  
6 fair record say, I have confidence that what  
7 they have put in here passes muster. And  
8 let's not enter an order that says well, in  
9 case we really screw it up we can fix it  
10 later. That seems to me cart before the  
11 horse. And we're not asking for a full  
12 litigation. We're talking for -- I'm now  
13 asking for two three-hour depositions and  
14 those documents that the audit committee  
15 considered. They're available --

16 THE COURT: Wouldn't it end up  
17 in determining -- you're asking me to  
18 determine whether the audit committee acted  
19 appropriately in deciding to fire someone or  
20 not fire someone, and so that in fact we would  
21 have a litigation on all 15 people, because of  
22 course, you'd be going through that?

23 MR. COFFY: No, Your Honor, it  
24 would result in Your Honor writing a full

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1 record that says if this debtor comes to me  
2 and says --

3 THE COURT: All right. In my  
4 mind, that's the same thing. That's just  
5 lawyer double-talk. I'm sorry. A full record  
6 would be about a four or five day hearing on  
7 employment matters. And, I'm not going to do  
8 that on individual employment matters. That's  
9 crazy. I'm not going to do that.

10 MR. COFFY: Your Honor, a more  
11 complete record. A more complete record.

12 THE COURT: You're telling me  
13 that if you call as a witness Mary Smith who  
14 had, you're telling me, a review process with  
15 the audit committee and deposed her about that  
16 review process and the decision that the audit  
17 committee made not to fire her, that that's  
18 not going to turn into a full blown trial  
19 about the merits of retaining Mary Smith as an  
20 employee? There's no way. Mary Smith's  
21 lawyer and the debtors' lawyer and countless  
22 other people will start examining her on that  
23 issue and defending her on that issue and I'm  
24 going to be asked for a ruling whether Mary

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1 Smith should be an employee of Delphi. And  
2 that's exactly what the Second Circuit said I  
3 should not be doing.

4 MR. COFFY: Your Honor, we're  
5 not going to ask you for that. But, if the  
6 allegations --

7 THE COURT: What are --

8 MR. COFFY: But, Your Honor,  
9 if -- they have a KECP. The KECP will give  
10 money to Laura Marion. The deposition  
11 establishes that Laura Marion participated in  
12 a plan whereby there was a bogus sale --

13 THE COURT: Well, you're  
14 assuming the deposition establishes. There's  
15 going to be a huge fight over that. Of  
16 course.

17 MR. COFFY: But there's not  
18 even --

19 THE COURT: So, there's a  
20 solution to that, which is that the committee,  
21 which is a fiduciary for all these estates,  
22 and the debtor which is a fiduciary for all  
23 these estates, have a measure that protects  
24 against people where there is some issue.

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1 And, until I see that measure and decide  
2 whether it's appropriate or not, I'm not going  
3 to subject Ms. Marion or anyone else to that  
4 process. It doesn't make any sense. It's  
5 just money, and if the money is reserved,  
6 there's no harm to the estate. And there  
7 would be enormous harm to the estate and to  
8 these individuals in going through it in this  
9 way, as you're proposing.

10 MR. COFFY: Your Honor, I will  
11 sit down with the following statement: It  
12 appears to me that given the specific  
13 allegations that have been made, given the  
14 limited discovery we are seeking, that it is  
15 better to see whether going into this KECP, it  
16 was reasonably put together as opposed to  
17 figuring out how we're going to fix it if it  
18 turns out it wasn't. Thank you.

19 THE COURT: All right. Very  
20 well.

21 MR. BUTLER: Well, just so  
22 we're clear on this, is the Court therefore,  
23 prepared to grant our motion to quash before  
24 trial subpoenas?

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1 THE COURT: Yes.

2 MR. BUTLER: Thank you. I  
3 will submit an order.

4 THE COURT: Subject again, as  
5 I said, to seeing what you're actually  
6 proposing.

7 MR. BUTLER: We understand  
8 that we have the burden, and we understand  
9 what the Court has said to us, and we  
10 understand what I think we have to do, Your  
11 Honor. I think we're crystal clear on the  
12 Court's concerns.

13 THE COURT: Okay.

14 MR. BUTLER: And what we need  
15 to do at a summary proceeding, and we will do  
16 that.

17 I do want to report, Your  
18 Honor, µcause we were supposed to do this in  
19 connection with this, and I think Your Honor  
20 is aware of this. We did agree in finding  
21 guidance from Your Honor that we are providing  
22 somedesignations highly confidential under the  
23 protective order a list of the executives who  
24 are intended to be eligible under the

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1 incentive plan, and that eligibility will be  
2 as of the date we provide the list.

3 Obviously, new hires, other people may later  
4 be determined to be eligible. But we will  
5 provide that list and we have procedures and  
6 designs as reported in the meet and confer  
7 report to provide that to lead plaintiffs.

8 MR. ROSENBERG: Your Honor, a  
9 point of inquiry. Will that include the  
10 titles, the job titles?

11 MR. BUTLER: We're happy to  
12 include the job titles.

13 MR. ROSENBERG: Thank you.  
14 Thank you.

15 THE COURT: Okay.

16 MR. BUTLER: The second piece,  
17 Your Honor, is and I wanted the Court to be  
18 aware, we have also agreed to produce a list  
19 of the 25 individuals we referenced in the  
20 KECP motion and any others whom the debtors  
21 would reference in support of the retentive  
22 arguments in the KECP that Your Honor talked  
23 about last week. As, I believe, plaintiffs  
24 now understand, and I want the Court to

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1 understand, those 25 individuals did not  
2 include anyone who was separated by the  
3 company in connection with the audit committee  
4 investigation.

5 THE COURT: Okay.

6 MR. BUTLER: I just want the  
7 Court to be aware of that.

8 And then, Your Honor, with  
9 respect to the balances, I understand that  
10 other than providing Mr. Butler's deposition,  
11 there are no other further discovery  
12 requirements imposed upon us by the Court?

13 THE COURT: Well, no. I  
14 thought you were supposed to provide the  
15 documents that -- not the secondary and  
16 tertiary documents --

17 MR. BUTLER: Not the audit  
18 committee documents.

19 THE COURT: -- but the  
20 documents that were actually considered in  
21 connection with coming up with the KECP --

22 MR. BUTLER: Your Honor, we  
23 already have a data base of over 5,000  
24 documents that have been provided to the

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1 parties who have objected. There has been a  
2 lot of provisions -- or maybe, 5,000 pages,  
3 rather, of documents that have already been  
4 provided, and we have included as we reported  
5 in the meet and confer in our letter a process  
6 by which we will deliver well in advance of  
7 the hearing the protocol, assuming that we're  
8 able to work it out with the --

9 THE COURT: Well, the hearing  
10 is only ten days away. I don't know what well  
11 in advance means.

12 MR. BUTLER: We hope to have  
13 it done, as we said, by the 20th, and if we  
14 don't have it done, Mr. Rosenberg and I will  
15 reach an agreement about scheduling an  
16 adjournment of the thing.

17 THE COURT: Okay.

18 MR. BUTLER: We're not far.  
19 We're not going to come to this courtroom and  
20 not provide you that which we promised we  
21 would.

22 THE COURT: Okay. Mr.  
23 Rosenberg's been chomping at the bit to say  
24 something.

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1 MR. ROSENBERG: Well, Your  
2 Honor, if you'll indulge me, and I think  
3 you've been extremely indulgent this  
4 afternoon, but so many statements I've heard  
5 this afternoon have seemed so out-in-left-  
6 field in terms of what the committee  
7 anticipates happening on the 27th, that I'd  
8 like to just take literally one minute to  
9 outline what we think is happening and what we  
10 are prepared to support, because this is what  
11 we think is happening.

12 We are talking here about the  
13 debtors' business judgment in proposing a  
14 nine-month, nine-month, October to June, plan  
15 for compensation based on performance. With  
16 granularity pursuant to which people who meet  
17 an aggressive performance level are going to  
18 get compensated for meeting that aggressive  
19 goal, with granularity. Not the company  
20 overall, but you know, some sort of direct  
21 correlation between performance of an  
22 individual or group of individuals and  
23 aggressively attractive performance results.

24 That's what the committee is

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1 prepared to support. And, again, it's a nine-  
2 month period. We're not talking about KECPs  
3 in the --

4 THE COURT: Wait, when does it  
5 get paid?

6 MR. ROSENBERG: Your Honor,  
7 still to be discussed, still to be discussed.  
8 I don't know the answer to that, but if what  
9 the debtor puts forward doesn't meet the  
10 definition I just described in the committee's  
11 judgment, it's not going to have the  
12 committee's support. So, that's number one.  
13 We're talking about a limited nine-month  
14 period of aggressive performance-based goals  
15 and meeting those goals. We're not talking  
16 about retention. We're not talking a bonus  
17 for emergence. We're certainly not talking  
18 about equity in a re-organized company. We're  
19 not talking about any of those things. It's a  
20 very, very limited program, which is somewhat  
21 consistent, as Mr. Butler said, with past  
22 programs, except frankly, far more aggressive.  
23 The committee won't approve that which has  
24 been on the table before. It will be far more

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1 aggressive in terms of being granularly  
2 performance-based.

3 That, Your Honor, is well  
4 within the debtors' business discretion, it  
5 seems to me. And will or won't get the  
6 committee's support depending on the extent to  
7 which it needs to stand that I just laid out.

8 Now, what is not before the  
9 Court, what is not before the committee, is  
10 whether any particular person is or isn't,  
11 should or shouldn't be a long-term employee.  
12 We're talking about a bonus, which is based  
13 upon a measurement of performance for a nine-  
14 month period. And to get into the kinds of  
15 issues that Mr. Coffy is talking about in that  
16 context just seems to me to be truly out-in-  
17 left-field, and frankly, you do have to  
18 question the motives for it.

19 Part two is the piece that is  
20 simply self-evident. To the extent that any  
21 one of these employees is conceivably tied to  
22 any conceivable wrongdoing, the appropriate  
23 attachment to that money has to be there. And  
24 if a committee is not satisfied with that

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1 attachment, the committee will not be  
2 supporting the motion, even if it meets the  
3 other goal I just outlined.

4 And that's what's before the  
5 Court, Your Honor. It is neither broad-based,  
6 nor extensive in time frame, nor particularly  
7 complex, in my humble judgment.

8 THE COURT: Okay. All right.

9 MR. COFFY: Your Honor, if I  
10 may just briefly respond. The lead plaintiffs  
11 are not out to disqualify any individuals.  
12 That's not what this is about. We are out to  
13 prove to rebuff the presumption of  
14 reasonableness by showing that the KECP is  
15 flawed because whatever process they used has  
16 allowed these people to remain eligible. It's  
17 a distinction. We're not out to say, Judge,  
18 you need to go individual by individual.

19 THE COURT: Okay.

20 MR. COFFY: We have certain  
21 examples that we think will undermine the  
22 assurances you've been giving us.

23 THE COURT: And as I  
24 understand it, eligibility means remaining at

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1 the company, so in a way, it really does mean  
2 fired or not.

3 Anyway, I think I've been  
4 clear on this.

5 MR. COFFY: Thank you, Your  
6 Honor.

7 (Whereupon, the proceedings  
8 concluded.)

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I, Lisa Bar-Leib, hereby certify that  
the foregoing is a true and correct  
transcription, to the best of my ability, of  
the sound recorded proceedings submitted for  
transcription in the matter of: Delphi  
Corporation

I further certify that I am not employed  
by nor related to any party to this action.

In witness whereof, I hereby sign this  
date:

January 16, 2006.

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